Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

SARAH YEAROUS, TONYA CRISMAN, JONELL ROBINSON, and CHINTAMANI FRAHM,

Petitioners,

v.

NIOBRARA COUNTY MEMORIAL HOSPITAL, By and Through its Board of Trustees,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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82 pp

QUESTIONS PRESENTED

1. Can being asked by a supervisor to commit medicare fraud and to violate the code of ethics for nurses form a sufficient factual basis to support a claim for constructive discharge from a public hospital under U.S. Const. amend. XIV, § 1; 42 U.S.C. § 1983.

2. Must an employee who claims to have been constructively discharged under U.S. Const. amend. XIV, § 1; 42 U.S.C. § 1983 prove that the employer's intent was to bring about the employee's discharge?

3. Did the Court below identify an objective standard as the rule in reviewing the jury's verdict in favor of Petitioners, but apply a subjective standard in overruling the verdict of the Trial Court.

4. Should the Federal definition of the doctrine of constructive discharge be used in evaluating a breach of employment contract under Wyoming State law?

PARTIES

Petitioners are Tonya Crisman, Jonell Robinson, Chintamani Frahm and Sarah Yearous. Petitioners are nurses and former employees of Respondent Hospital. Respondent Niobrara County Memorial Hospital District is a public Hospital which is organized as a Hospital District under W.S. 35-2-401 et seq. in Lusk, Wyoming.

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PETITION FOR WRIT OF CERTIORARI

Sarah Yearous, Tonya Crisman, Jonell Robinson and Chintamani Frahm ("Nurses"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on October 21, 1997, in that the Tenth Circuit has entered a decision which has decided an important question which is in conflict with another United States Court of Appeals on an important issue of Federal Law which should be settled by this court, and has attempted to re-weigh the evidence and ignore substantial evidence in favor of the petitioners by substituting its judgment for the judgment of the jury thus triggering this Court's supervisory power. Finally the decision entered by the Tenth Circuit Court has decided an issue that should be decided under Wyoming Law.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this petition has been published by the Tenth Circuit. It is reprinted in Appendix A hereto ("App. A") at page A-1. By order filed November 18, 1997, the Tenth Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. B, B-1.

JURISDICTION

The District Court for the District of Wyoming exercised federal question jurisdiction in this case under 28 U.S.C. § 1331 and 42 U.S.C. § 1983; and pendent jurisdiction of state claims pursuant to 28 U.S.C. § 1367(a). Judgment was entered by the District Court on September 12, 1996, in favor of the Petitioner Nurses. (App. D-1 at page D-2). The Respondent Niobrara County Memorial Hospital District ("Hospital") filed its motion for judgment as a matter of law after trial, or in the alternative, for a new trial on September 25, 1996. The District Court entered a judgment for costs and attorneys' fees on October 18, 1996. On October 22, 1996, the District Court entered its order denying Defendants' motion for a new trial. The Court's Order Denying Defendant's Motion For New Trial is reprinted in Appendix C. ("App. C") at page C-1. Defendant timely filed its notice of appeal on November 8, 1996, and on October 21, 1997, the Tenth Circuit Court of Appeals reversed the jury's verdict in its published opinion. (App. A-1). On November 18, 1997, the Tenth Circuit denied Petitioners' timely filed motion for rehearing and suggestion en banc. (App. B) at page B-1. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Tenth Circuit Court of Appeals reversed the judgment which was entered at the District Court level finding that there were insufficient facts to support the Petitioners' constructive discharge claim under both the due process theory and the pendent state law claim for breach of employment contract. The Tenth Circuit remanded the case for the entry of judgment in favor of the Respondent pursuant to F.R.C.P. 50. The Petitioners timely filed a motion for reconsideration and a suggestion for rehearing en banc which were denied on November 18, 1997. (App. B) at page B-1.

The Petitioners were employed as nurses with the Respondent public Hospital. While employed, the nurses were asked by the Director of Nurses to falsify records to improperly obtain medicare funding for the hospital for patients who would not otherwise qualify for medicare benefits. The request to falsify records was illegal and in violation of the code of ethics for nurses.

The decision by the Tenth Circuit Court of Appeals concluded "the record is devoid of any evidence upon which a reasonable jury could return a verdict for Plaintiffs under the controlling law . . . " App. A at page A-2. In support of this conclusion the Court below ignored overwhelming evidence in the record upon which the jury concluded that Petitioners were forced to quit their jobs. In the Order Denying Motion For Summary Judgment, the Trial Judge concluded "Being asked to violate the law and being compelled to resign to protect their nursing licenses can be considered to be aggravating

factors that would render continued employment intolerable and would cause employment conditions to be more than merely unpleasant." The Order Denying Summary Judgment is reproduced in App. E at page E-1. The district court, in its subsequent Order Denying Defendant's Motion for New Trial states:

> "this Court disagrees that the evidence could have been viewed in only one way so as to compel the conclusion that the evidence was uncontroverted in the case. The testimony heard by the jury was such that more than one inference could have permissibly been drawn in this case. The function of the trier of fact, the jury, is to make the choices and decisions that required in such circumstances. The jury did so in this case, and determined that the plaintiffs had been constructively discharge and that they were entitled to recover from the defendant. This is exactly what a jury is required to do – determine whether a reasonable person would view the working conditions as intolerable so as to constitute a constructive discharge in the circumstances of this case and, correspondingly, resolve concomitant issues relating to plaintiff's Section 1983 and due process claims . . . It is certainly plausible that the jury could have reached a contrary conclusion upon the evidence that was presented to it during the course of trial and considered by the jury during its deliberations. The jury could have determined these factual disputes in a manner other than it did. However, this Court will not now re-weigh the evidence nor will it substitute its judgment for that of the jury." App. C at pages C-1, C-6.

The facts which were before the Tenth Circuit Court in a light most favorable to the Petitioner as they

appeared in the Statement of Facts from the Brief of Plaintiffs-Appellees in the Court below, are reproduced in App. D at page D-5. In summary, the facts which support the jury's verdict include the following facts.

In May, 1995, The Hospital admitted that a specific candidate for the position of director of nursing was unqualified but hired her anyway. Immediately after she was hired, the Administrator of the Hospital left on a three week vacation leaving the new incompetent director of nursing in charge. The Director immediately began advocating and attempting to implement a plan to defraud medicare by falsifying admission dates in the medical records of various patients. Her activities placed the nursing licenses of all the Petitioners at risk. She lied to state inspectors concerning staffing in the presence of one of the Petitioners. She advocated and performed incompetent nursing procedures to obtain extra money from the Medicare program. Petitioners were afraid they were going to lose their licenses and potentially go to jail. They repeatedly reported these events to the Hospital board of directors through the chain of command, but the board did nothing to address their concerns and refused to meet with them. When the Hospital Administrator returned from vacation he investigated the allegations and within several days of his return, fired the Director. The same day she was fired, the Director asked for and received a special board hearing. The day after this hearing, the Director was ordered reinstated by the Board, without any remedial measures. Despite repeated requests, the board denied the Petitioner nurses any sort of a hearing on these issues and, through the Administrator, informed the Petitioners that the board did not want

to hear their concerns. Most of the hospital department heads signed a memorandum with was submitted to the board which indicated that they felt Petitioners had no choice but to resign. They also testified at the trial that the nurses had no choice but to resign. Both of the Respondent's expert witnesses and a hospital board member admitted on the stand that if the facts as alleged by Petitioners were true, the Petitioners had no choice but to resign.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Opinion incorrectly applies a subjective standard for the review of the Jury's verdict.

The Tenth Circuit Opinion identifies the rule for review of a denial of a motion for judgment as a matter of law under Fed. R. Civ. P. 50, as requiring a reversal only if the evidence points but one way and is susceptible to no reasonable inferences supporting the nonmoving party. *Haines v. Fisher*, 82 F.3d 1515, 1522, (10th Cir. 1997). It goes on to recognize that the facts must be reviewed in a light most favorable to the Plaintiff. *Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir. 1996). The Court then goes on to re-interpret the facts in a light most favorable to the Respondent, minimizing and in some places ignoring competent evidence supporting a constructive discharge. The objective standard required was applied by the jury to find that a constructive discharge occurred. The District Judge agreed with the jury when he refused to grant the Respondent's Summary

Judgment and the Motion for a New Trial. The Tenth Circuit Court improperly substituted its judgment for the judgment of the jury in violation of established appellate procedure. *Mason v. Oklahoma Turnpike Authority*, 115 F.3d 1442, 1450 (10th Cir. 1997). The decision by the Tenth Circuit Court is based upon the premise that the resignations in this case were voluntary and therefore not compelled. This is a factual determination that was decided by the jury in favor of the nurses. *Cockrell v. Boise Cascade Corp.*, 781 F.2d 173, 178 (10th Cir. 1986). In finding that there was no constructive discharge, the Tenth Circuit Court is re-weighing the evidence, passing on the credibility of witnesses, and substituting its conclusions for that of the jury. The Court cites *Lenz v. Dewey*, 64 F.2d 547, 552 (10th Cir. 1995) and *Parker v. Board of Regents of Tulsa Jr. College*, 981 F.2d 1159, 1162 (10th Cir. 1992) as detailing the factors that should be considered by the jury to evaluate the voluntariness of the resignations. The jury was not instructed on these elements. The trial court ruled that the analysis in *Lenz* did not apply under the facts of the case. At the instruction conference when this instruction was considered, the hospital admitted that the *Lenz* instruction which was proposed by Hospital was contentious. Hospital also agreed that the facts in *Lenz* were distinguishable from the facts of this case. If the jury was improperly instructed the appropriate remedy for the Tenth Circuit would have been to remand the case for a new trial so that the jury could consider the issue under the correct instruction. In reinterpreting the evidence and remanding the case for entry of judgment for the Hospital, the Tenth Circuit Court has substituted its own subjective analysis for that of the jury on an issue that must be decided by a jury using an objective standard.

II. There is a dispute between the Court of Appeals for the Fifth Circuit and the Court of Appeals for the Tenth Circuit with respect to whether there is an intent requirement which must be demonstrated by an employee claiming to have been constructively discharged.

Petitioners maintain that the contours of the constructive discharge doctrine is an important question of federal law. There is a dispute between the decisions of the Fifth Circuit cases including *Fowler v. Carrollton Public Library*, 799 F.2d 976, 979 (5th Cir. 1986) which requires that a Plaintiff who claims to have been constructively discharged must show that the Employer intended the employee to quit. The Tenth Circuit decisions including *Spulak v. KMart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990) do not require a showing that the employer intended to force the employee to quit. The contours of the constructive discharge doctrine is an important question of Federal law that should be decided by this Court.

III. The Tenth Circuit Court's reversal of the verdict on the state law claim for breach of contract based upon the federal definition of constructive discharge was error.

The Tenth Circuit decision applies federal law to an important question of Wyoming State law. The question of whether there was a breach of employment contract under Wyoming State law is a state law question. The jury in this case was instructed on a state law theory of breach of employment contract. The nurses alleged that the Hospital had a clear and unambiguous policy which required the administrator to set up a hearing with the

board of directors if an employee wished to address the board. There was evidence at the trial that the nurses had asked for a hearing with the board on several occasions. The policy was introduced in evidence at the trial, and the administrator admitted that he did not follow the policy. The failure to follow an employment policy by an employer can be the basis for breach of an employment contract under Wyoming state law. *Mobile Coal Producing, Inc., v. Parks,* 704 P.2d 708 (Wyo. 1985). This case was submitted to the jury under a breach of contract theory, and the verdict form clearly delineated between the damages available under a breach of contract theory and the due process theory. It was therefore possible for the verdict to be reduced by the damages which were attributed to the due process violation and allow the damages for breach of contract to stand in the event error was found in the due process claim. When the Tenth Circuit Court elected to reverse the breach of contract verdict based upon lack of evidence of constructive discharge it applied Federal constructive discharge law to an issue that should have been evaluated under existing Wyoming law. In applying the Federal requirements of constructive discharge to a state law issue, the Tenth Circuit Court therefore incorrectly decided a question of state law that has already been settled by the Supreme Court for the State of Wyoming. The breach of contract claim was not dependent upon a constructive discharge and the reversal based upon constructive discharge law by the Tenth Circuit Court was therefore error.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SARAH YEAROUS; TONYA CRISMAN; JONELL ROBINSON; and CHINTAMANI FRAHM,	)	
Plaintiffs-Appellees,	)	No. 96-8108
v.	)	(Filed
NIOBRARA COUNTY MEMORIAL HOSPITAL, by and through its Board of Trustees,	)	Oct. 21, 1997)
Defendant-Appellant,	)	
and	)	
VICKI WINNEY,	)	
Defendant.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF WYOMING
(D.C. No. 96-CV-1005)

John D. Whitaker (James R. McCarty with him on the brief), Casper, Wyoming, for Plaintiffs-Appellees.

John G. Fenn (Michael K. Davis with him on the brief), of Yonkee & Toner, Sheridan, Wyoming, for Defendant-Appellant.

Before BALDOCK, BRORBY, and BRISCOE, Circuit Judges.

BALDOCK, Circuit Judge.

Plaintiffs Tonya Crisman, Jonell Robinson, and Chintamani Frahm are registered nurses. Plaintiff Sarah Yearous is a licensed practical nurse. All are former employees of Defendant Niobrara County Memorial Hospital. Each resigned their employment with Defendant in August 1995. They subsequently brought this action alleging, among other things, that Defendant constructively discharged them from their employment, and in so doing deprived them of property without due process of law. *See* U.S. Const. amend. XIV, § 1; 42 U.S.C. § 1983. A jury returned a verdict for Plaintiffs and awarded them damages totaling $877,637.00. Defendant appeals the district court's denial of its motion for judgment as a matter of law claiming the evidence was insufficient to support the jury's finding of constructive discharge. *See* Fed. R. Civ. P. 50. Our jurisdiction arises under 28 U.S.C. § 1291. Because we conclude that the record is devoid of any evidence upon which a reasonable jury could return a verdict for Plaintiffs under the controlling law, we reverse the judgment of the district court and remand with instructions to enter judgment in favor of Defendant.

Standard of Review

We review de novo the district court's denial of a motion for judgment as a matter of law under Fed. R. Civ. P. 50. *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1522 (10th Cir. 1997). The standards governing our review are well established. We will reverse the denial of a Rule 50 motion only if the evidence points but one way and is susceptible to no reasonable inferences supporting the nonmoving party. *Haines v. Fisher*, 82 F.3d 1503, 1510 (10th Cir. 1996). "We do not weigh the evidence, pass on the credibility of witnesses, or substitute our conclusions for that of the jury. However, we must enter judgment as a matter of law in favor of the moving party if there is no legally sufficient evidentiary basis with respect to a claim . . . under the controlling law." *Mason v. Oklahoma Turnpike Authority*, 115 F.3d 1442, 1450 (10th Cir. 1997) (internal quotations and ellipses omitted). Mindful of this standard, we turn to the present appeal.

I.

Reviewing the facts in a light most favorable to the Plaintiffs, *see Harolds Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir. 1996), the record reveals that Niobrara County Memorial Hospital is a small rural health care facility in Lusk, Wyoming. The facility consists of a hospital with ten beds and a nursing home with thirty-six beds. The facility employs approximately sixty individuals, twelve to fourteen of whom are nurses. Ultimate responsibility for the operation of the facility rests

with a six-member board of trustees. A hospital administrator is responsible for the facility's daily operations. A director of nursing supervises the facility's nursing staff.

In May 1995, a vacancy arose in the director of nursing position at the facility. While the board conducted a search to fill the position, Plaintiffs Crisman and Robinson helped perform the director's duties. Three individuals, including Vicki Winney, applied for the position. Winney is a registered nurse who at the time was employed in the nursing home portion of the facility. When one applicant rejected an offer from the board and another withdrew her application, Winney became the only remaining candidate for the position. Both Crisman and Robinson, each of whom previously had served as temporary directors of nursing at the facility, expressed reservations about Winney's qualifications. Although the board knew she was inexperienced and perhaps unqualified, on July 10, 1995, Winney became the director of nursing at Niobrara County Memorial Hospital. On July 15, the hospital administrator and Winney's immediate supervisor, Jeff Struble, left on a three-week vacation. Struble left Winney in charge of the nursing staff.

Problems arose on Winney's second full day as director. On July 12, 1995, Patient A arrived from the Wyoming Medical Center in Casper. Contrary to established procedure, staff admitted Patient A into the nursing home side of the facility without a doctor's order. Subsequently, a staff doctor ordered Patient A transferred to swing bed status, i.e., a level of intermediate care between full hospitalization and nursing care on the hospital side of the facility. Winney and Plaintiff Robinson disagreed about how to document Patient A's transfer to swing bed status.

Because no record of Patient A's transfer from Casper to the nursing home existed, Winney suggested charting Patient A into swing bed status directly from Casper. Robinson, however, insisted on charting Patient A in from the nursing home. Although Robinson testified that she believed Winney was asking her to falsify Patient A's records, Robinson completed the patient's transfer chart as she deemed proper and suffered no adverse consequences as a result.

Another problem arose on Winney's fifth full day as director. On July 17, 1995, a patient suffering from terminal cancer had a seizure. Winney and Plaintiff Yearous were present when the seizure occurred. Yearous asked Winney to obtain a doctor's order for medication to stop the seizure. Winney attempted to contact a doctor but was unable to do so. When Winney returned to the room, the patient's seizure had stopped. Consequently, Winney told Yearous that immediate medication was unnecessary. Yearous subsequently obtained a doctor's order for medication with Robinson's assistance. Yearous testified that she believed Winney was jeopardizing patient care. Yearous, however, did not file an incident report with Winney's superiors.

Problems continued when on July 26, 1995, Patient B arrived from United Medical Center in Cheyenne. Patient B had a wound on his left lower leg which required irrigation by means of a catheter placed inside the wound. Winney and Plaintiff Frahm disagreed about how to perform the patient's dressing change. Winney believed the change need only be completed in a "clean," rather than a "sterile" manner. When she witnessed

Frahm performing the dressing change in a sterile manner, a heated discussion ensued in front of the patient. Frahm suggested that they continue their discussion outside the patient's room. Their continued discussion resulted in an impasse. Frahm continued to perform the dressing change in the manner she felt appropriate without ramification.

Perhaps the most serious allegations against Winney concerned Patient C. On July 25, 1995, hospital staff admitted Patient C as an acute care patient with a skin disorder and confusion. On July 27, 1995, the attending physician ordered Patient C transferred to swing bed status because no nursing home beds were available. Winney's duties included utilization review for compliance with Medicare classifications and qualifications. Winney recognized that Patient C did not qualify for Medicare reimbursement because he had not spent the required three prior nights in acute care. According to Plaintiffs Robinson and Frahm, Winney suggested that the dates in Patient C's records be changed to qualify him for Medicare. On cross-examination, however, Robinson testified as follows:

> Q. And Ms. Winney comes up and looks at Patient C's chart; is that correct?
>
> A. Eventually she got his chart, yes.
>
> Q. And she's flipping through it as the three of you were there; is that right?
>
> A. She opened the chart. I didn't see the section she opened it to.
>
> Q. She opened the chart?
>
> A. Yeah. Yes.

Q. And then your testimony is she said, "All we have to do is change these dates," correct?

A. Correct.

Q. And Chin Frahm immediately said, "I'm not changing anything," or words to that effect, right?

A. That's correct.

Q. And Ms. Winney immediately replied, "No, no, no. I'm not asking you to change anything"; isn't that true?

A. That wasn't my interpretation of what she said.

Q. Well, I'm not talking about interpreting what she said. I'm talking about the words she spoke. She said, "No, no. no. I'm not asking you to change anything," didn't she?

A. She said, "No, no, no. I'm not asking you to change anything."

Q. Right. In fact, if there were going to be any change in Mr. C's status, that would require that Dr. Hawley change something; isn't that true?

A. I don't know from that point what –

Q. Well –

A. – she said.

Q. We're not talking about what she said.

A. Or meant. I don't know what she meant.

Q. Well, I'm not talking about what she said or what she meant. I'm talking about what was required as a matter of policy by Medicare. As a matter of fact, it would require a doctor, Dr.

> Hawley, to change the patient's status, isn't that right, from swing bed to acute, or acute to swing bed?
>
> A. It requires a doctor's signature, yes.

Aplt. App. Vol. II at 452. Frahm testified to essentially the same facts on direct examination. *See* Aplt. App. Vol. II at 534. In the end, Patient C's records remained unaltered and he failed to qualify for Medicare.

Plaintiff Crisman was on vacation the entire month of July. She testified, however, to two problems she experienced with Winney upon her return in August. The first concerned an attending physician's medication order. Confusion arose as to whether the physician wished to change the order. When the physician was unavailable, Winney instructed Crisman to contact the doctor on call for instructions. When Winney informed the attending physician of the situation he became upset and told Winnie the medication order was part of the patient's file. Winney then asked Crisman what she didn't understand about the physician's order. Crisman testified that she did not feel Winney was supportive. The patient ultimately received the proper medication and the matter passed without incident.

The second problem between Winney and Crisman involved an individual with high blood pressure. The individual routinely came to the hospital to have his blood pressure checked. Two days in succession Crisman checked the patient's blood pressure. Both times Crisman informed him that his blood pressure was quite high and he should remain at the hospital while she contacted a doctor. Both times he refused and left. Crisman submitted

reports of the incidents. Subsequently, Crisman became upset when she learned that Winney was reviewing the individual's medical file. After reviewing the file, Winney concluded that Crisman had done nothing improper.

During Administrator Struble's vacation, Plaintiffs Robinson and Frahm spoke with Lori Fields, the facility's director of finance, about these and other problems, namely staffing concerns, that all four Plaintiffs had with Winney. Fields in turn related Plaintiffs concerns to board vice-president Kenny DeGering. DeGering suggested Plaintiffs' concerns could wait until Struble returned from vacation. Neither Plaintiffs nor Fields ever spoke to Winney directly. On August 7, 1995, Struble returned from vacation. That same day, Plaintiffs Robinson, Frahm, and Crisman submitted complaints to Struble regarding Winney. Only then did Winney learn that the Plaintiffs were upset with her performance. Plaintiff Yearous did not submit a complaint. Before Struble could complete his investigation, on August 9, 1995, all four Plaintiffs submitted their resignations and gave two weeks' notice. Plaintiffs chose to forego filing a grievance with the hospital's personnel committee.

To appease Plaintiffs, Struble discharged Winney the next day, August 10, 1995. Struble discharged Winney not because of any confirmed wrongdoing, but because of the turmoil within the facility and generally poor morale of the staff. That same evening, Winney met with the board of trustees at her request and explained her position. The board met with Struble the following day. When Struble informed the board that he had found nothing to substantiate Plaintiffs' allegations against Winney, the board directed him to reinstate her.

The board also instructed Struble to ask Plaintiffs to rescind their resignations and remain with the hospital while trying to resolve their differences with Winney. Despite his persistent pleas, Plaintiffs informed Struble that they would not rescind their resignations so long as Winney remained director of nursing. Winney personally asked Plaintiff Yearous to stay but to no avail. All four Plaintiffs had left the hospital by August 21, 1995, less than two months after Winney's appointment as director of nursing. Plaintiffs requested an informal hearing before less than the entire board, but the board offered them only a formal hearing before the entire board at its regularly scheduled meeting in August. Plaintiffs declined the offer and no hearing occurred. On September 7, 1995, Plaintiff Frahm unsuccessfully applied for the director's position knowing that Winney remained in the position. This lawsuit followed.

II.

Over a decade ago we held that an employee's constructive discharge from a position in which the employee has a protectable property interest may be actionable under 42 U.S.C. § 1983. *Bailey v. Kirk*, 777 F.2d 567, 579 (10th Cir. 1985). To determine whether Plaintiffs in this case have a viable cause of action under § 1983, we first ask whether Defendant deprived Plaintiffs of a protected property interest. Plaintiffs were entitled to procedural due process, i.e., a hearing before the hospital's board of trustees, only if Defendant deprived them of property. Defendant acknowledges that Plaintiffs had a protected property interest in continued employment with the hospital by way of an implied contract. *See*

Bishop v. Wood, 426 U.S. 341, 344 (1976) (property interest in employment may be created by an implied contract). Defendant submits, however, that Plaintiffs were not constructively discharged; rather Plaintiffs voluntarily resigned. If Plaintiffs resigned of their own free will, even as a result of Defendant's actions, then they voluntarily relinquished their property interests and, thus, Defendant did not deprive them of property without due process of law. *See Parker v. Board of Regents of Tulsa Jr. College*, 981 F.2d 1159, 1161-62 (10th Cir. 1992).

To determine whether a jury question exists as to the voluntariness of Plaintiffs' respective resignations, we consider the totality of the circumstances under an objective standard. *See Parker*, 981 F.2d at 1162; *accord Hargray v. City of Hallandale*, 57 F.3d 1560, 1570 (11th Cir. 1995). At the outset, we must determine if Plaintiffs have established that their resignations were involuntary based upon a reasonable person test. *See Maez v. Mountain States Telephone and Telegraph, Inc.*, 54 F.3d 1488, 1502 (10th Cir. 1995). Among the factors we consider in determining the voluntariness of an employee's resignation are "(1) whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice [s]he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether [s]he was permitted to select the effective date of resignation." *Parker*, 981 F.2d at 1162; *accord Lenz v. Dewey*, 64 F.2d 547, 552 (10th Cir. 1995); *Cacy v. City of Chickasha*, ___ F.3d ___, 1997 WL 537864 at *6 (10th Cir. 1997) (unpublished).

By comparison, "[a] resignation will be involuntary and coerced when the totality of the circumstances

indicate the employee did not have the opportunity to make a free choice." *Parker*, 981 F.2d at 1162. Constructive discharge occurs when a reasonable person in the employee's position would view the working conditions as intolerable. That is to say the working conditions, when viewed objectively, must be so difficult that a reasonable person would feel compelled to resign. *Woodward v. City of Worland*, 977 F.2d 1392, 1401 (10th Cir. 1992). A plaintiff's subjective views of the situation are irrelevant. *Irving v. Dubuque Packing Co.*, 689 F.2d 170, 172 (10th Cir. 1982); *accord Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159, 1162 (3d Cir. 1993). Essentially, a plaintiff must show that she had " *'no other choice* but to quit.' " *Woodward*, 977 F.2d at 1401 (quoting *Irving*, 689 F.2d at 172) (emphasis in original); *accord Peterson v. Sweetwater County School Dist. No. 1*, 114 F.3d 1198, 1997 WL 312420 at *2 (10th Cir. 1997) (unpublished).

III.

According to Plaintiffs, they had no choice but to end their employment relationship with Niobrara County Memorial Hospital so long as Winney remained director of nursing. Plaintiffs faced the dilemma of disobeying their superior with its accompanying consequences, or following her orders which they believed were at best unethical and at worst unlawful. Plaintiffs claim Winney (1) compromised their ethics, (2) requested them to commit Medicare fraud, (3) jeopardized patient care, and (4) violated internal policies and procedures. Plaintiffs testified that Winney's conduct made them fear for their professional reputations and licenses, and an expert endorsed their concerns.

To be sure, this case exposes numerous instances of questionable judgment on behalf of all involved. The board exercised questionable judgment when it hired Winney as director of nursing. Administrator Struble exercised questionable judgment when he left on a three-week vacation four days after Winney assumed her duties. Winney exercised questionable judgment in fulfilling her duties as director. Plaintiffs exercised questionable judgment in taking an "either she goes or we go" approach to the problem. But a series of questionable judgments leading to difficult working conditions does not alone support a claim of constructive discharge or unconstitutional misconduct.

The question is not whether working conditions at the facility were difficult or unpleasant. Nor is the question whether Winney was incompetent or unethical. Rather, the question at this stage is whether Plaintiffs, at the time of their respective resignations, had the opportunity to make a free choice regarding their employment relationship with Niobrara County Memorial Hospital. *See Parker*, 981 F.2d at 1162. On this record, we conclude as a matter of law that they did. Viewing the facts objectively and considering the totality of the circumstances as the law requires, we believe no reasonable jury could conclude that Plaintiffs were constructively discharged.

Applying the four factors we have considered in prior cases to determine the voluntariness of an employee's resignation, *see Lenz*, 64 F.3d 547, we first note that the board gave Plaintiffs an alternative to resignation, namely continuing to work and attempting in good faith to resolve their problems with Winney through

internal procedures. Second, the facts illustrate that Plaintiffs understood quite well the choice the board gave them. Third, the board gave Plaintiffs an indefinite time period in which to choose by asking them to rescind their resignations and remain with the hospital. Finally, because the board did not want Plaintiffs to resign, Plaintiffs had complete control over the effective date of their resignations.

Other factors also support our conclusion. The most serious allegations against Winney concerned her apparent desire to have Plaintiffs Robinson and Frahm alter the medical records of Patients A and C, respectively. The record is equivocal, however, as to what Winney was actually suggesting. Both Robinson and Frahm testified that when they confronted Winney, she stated she was not asking them to change anything. In the end, Robinson and Frahm proceeded as they deemed appropriate, nobody altered the patients' records, and Winney never took any personnel action against the two Plaintiffs. The facts at most suggest that Winney, who was unqualified to be director of nursing, asked Plaintiffs to do things which they believed were unethical and which they refused to do without repercussion.

Similarly, the other problems to which Plaintiffs testified, while perhaps cause for concern, were not so serious as to give a reasonable person no other choice but to resign. The problem that Plaintiff Yearous experienced with the seizure of the terminally-ill patient, that Plaintiff Frahm experienced with the dressing change of Patient B, and that Plaintiff Crisman experienced with the physician's medication order and the individual's high blood pressure, when considered in light of the entire record,

are insufficient to support a claim of constructive discharge.

The time factor also supports our conclusion. The time frame in which the problems occurred leading to Plaintiffs' resignations was brief. *See Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1996) ("An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged."). Winney began serving as director of nursing on July 12, 1995. Less then one month later on August 9, 1995, and only two days after Struble had returned from a three week vacation, Plaintiffs' submitted their resignations. Notably, Plaintiff Crisman had been on vacation the entire month of July and had worked under Winney only a week before submitting her resignation. In their attempt to get Winney discharged, which initially was successful but ultimately failed, Plaintiffs unreasonably refused to explore any option short of resignation.

The facts when viewed in a light most favorable to Plaintiffs and under the controlling law establish that Plaintiffs' resignations were voluntary, albeit as a result of unpleasant and difficult circumstances. Accordingly, Niobrara County memorial Hospital did not deprive Plaintiffs of a protected property interest in their employment without due process of law. As we have concluded Plaintiffs' due process claims fail, Plaintiffs' related contract claims fail for the same reasons. The judgment of the district court is reversed and the cause remanded for the

entry of judgment in favor of Defendant pursuant to Fed. R. Civ. P. 50.[1]

REVERSED AND REMANDED.

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[1] Plaintiffs' motion to file a reply brief to Defendant's reply brief is denied. Defendant's motion to strike Plaintiffs' motion to file a reply brief is denied as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SARAH YEAROUS, TONYA CRISMAN, JONELL ROBINSON, and CHINTAMANI FRAHM,	)	
Plaintiffs-Appellees,	)	No. 96-8108
v.	)	
NIOBRARA COUNTY MEMORIAL HOSPITAL, by and through its Board of Trustees,	)	
Defendant-Appellant.	)	

ORDER

Filed November 18, 1997

Before **BALDOCK, BRORBY,** and **BRISCOE,** Circuit Judges.

The petition for rehearing filed by Sarah Yearous, Tonya Crisman, Jonell Robinson and Chintamani Frahm, is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on

rehearing en banc so the suggestion for en banc rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ L. Balzano
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

SARAH YEAROUS and TONYA CRISMAN, Plaintiffs, v. NIOBRARA COUNTY MEMORIAL HOSPITAL, by and through its Board of Trustees, and VICKI WINNEY, Defendants.	No. 96-CV-1005-J Consolidated with 96-CV-1006-J (Filed Oct. 22, 1996)

JONELL ROBINSON and CHINTAMINI FRAHM, Plaintiffs, v. NIOBRARA COUNTY MEMORIAL HOSPITAL, by and through its Board of Trustees, and VICKI WINNEY, Defendants.	No. 96-CV-1006-J

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

The defendant's Motion for Judgment as a Matter of Law After Trial or, in the Alternative, For a New Trial, the plaintiffs' response in opposition to the defendant's

motion, and defendant's further reply thereto came before the Court for consideration. The Court, having considered the defendant's motion, and the materials filed in support of and in opposition thereto, and being fully advised in the premises, FINDS that the defendant's motion for new trial should be DENIED.

In its motion for new trial, defendant argues that several errors of law were made, which affected the substantial rights of the defendant. Defendant argues that the jury's findings are clearly against the weight of the evidence and that the jury verdict cannot be allowed to stand. Defendant also objects to the admission of the certain exhibits during trial, particularly Plaintiffs' Exhibit 3, which was admitted, with a limiting instruction from the Court. Defendant argues that admitting this exhibit, even with limiting instructions, unduly prejudiced and influenced the jury to the detriment of the defendant hospital. Defendant further argues that this Court's refusal to give tendered instructions constitutes error. The defendant also argues that this Court erred when it did not permit evidence of dismissal of complaints made by plaintiffs Robinson and Frahm to the State Board of Nursing also unduly prejudiced and influenced the jury to its detriment. Defendant argues that the Court also improperly allowed the testimony of Judith Turner expressing opinions as to the dilemma in which plaintiffs were placed in the circumstances of this case, and contend that admission of such testimony was without proper foundation, was speculative, and invaded the province of the jury.

Plaintiffs have opposed the defendant's motion for a new trial. In their resistance to the defendant's motion,

plaintiffs argue that there was sufficient evidence presented to the jury that would have permitted the jury to render a verdict and finding of constructive discharge. The verdict in favor of plaintiffs on the constructive discharge claim, plaintiffs argue, should not be overturned upon defendant's motion. It would be an abuse of discretion if the Court were to do so in this case. Plaintiffs argue that the Court should only grant such a motion when the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence. Plaintiffs contend the jury's verdict is not against the weight of the evidence, although they, as well as defendant, tacitly acknowledge that reasonable minds could have differed and that the jury could have returned a verdict in favor of the defendant hospital.

The factual issues raised by the constructive discharge claim, in particular, were questions for resolution by the jury that should not now be second-guessed by the Court upon motion following trial. Plaintiffs contend that the Court properly allowed the jury to consider the exhibit and testimony offered during trial, and that the Court did not err by failing to give defendant's tendered instructions.

Standard of Review

The defendant has filed a Motion For A Judgment As A Matter Of Law, Or, In The Alternative, For A New Trial. Rule 59 Fed. R. Civ. P. is an embodiment of the common law principle that it is the responsibility of a judge who is dissatisfied with a jury's verdict to set that verdict aside and grant a new trial. 11 Charles A. Wright & Arthur R.

Miller, *Federal Practice and Procedure* § 2801 (1973). Rule 59 addresses motions for new trials and altered or amended judgments, and provides in pertinent part:

> (a) Grounds. A New trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . .

Whether a new trial should be granted is a matter in which the trial court is given broad discretion because the trial court is in a better position to evaluate claims of jury confusion and other errors. *Midamerica Federal S & L v. Shearson/American Exp.*, 886 F.2d 1249, 1262 (10th Cir. 1989). " 'A new trial on part of the issues is appropriate where "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." ' " *Id.* (quoting *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1163 N. 22 (10th Cir. 1985) (in turn quoting *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931)).

The grounds for granting a motion for a new trial are quite broad. Generally stated, a "court should exercise its discretion to grant a new trial 'whenever, in its judgment, this action is required in order to prevent injustice.' " *Whalen v. Roanoke County Bd. of Sup'rs*, 769 F.2d 221, 226 (4th Cir. 1985) (quoting Wright & Miller § 2805). The grounds for granting a new trial include, *inter alia*: That the verdict is too large; that the verdict is against the weight of the evidence; and, that the jury was improperly instructed. *See* Wright & Miller § 2805.

The standard for granting a new trial is a more lax standard than that which governs the motion for directed verdict or motion for a judgment as a matter of law (formerly known as the j.n.o.v.). Therefore, "on a motion for a new trial – unlike a motion for a directed verdict or for judgment notwithstanding the verdict – the judge may set aside the verdict even though there was substantial evidence to support it." Wright & Miller § 2806; *see also National Car Rent. Sys., Inc. v. Better Monkey Grip Co.*, 511 F.2d 724, 725 (5th Cir. 1975) (a determination that the jury's findings were against the weight and preponderance of the evidence, while a permissible basis for granting a new trial, is an inadequate basis for a j.n.o.v.).

> "Obvious and prejudicial error in instructing the jury constitutes grounds for a new trial" even absent failure to object before the trial court. *Fryman v. Federal Crop Ins. Corp.*, 936 F.2d 244, 248 (6th Cir. 1991). "The critical inquiry with regard to jury instructions is 'whether the instructions as a whole provide the jury with sufficient guidance concerning the issues to be tried.' " *Id.*, (quoting *Bagherzadeh v. Roeser*, 825 F.2d 100, 1003 (6th Cir. 1987)).

The Court will not grant a new trial "unless it is reasonably clear that prejudicial error has crept into the record of that **substantial justice** has not been done". 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2803 (1973); *See also Dixon v. Maritime Overseas Corp.*, 490 F.Supp. 1191, 1194 (D.C.N.Y. 1980), *aff'd*, 646 F.2d 560 (2d Cir. 1980), *cert. den.*, 454 U.S. 838 (1981) (emphasis added). The harmless error rule, Rule 61 Fed. R. Civ. P., provides that "[n]o error . . . is ground for granting a new trial . . . unless refusal to take such action

appears to the court inconsistent with **substantial justice**." (emphasis added). In granting a new trial a showing of prejudice "is essential." *Hoops v. Watermelon City Trucking Inc.*, 846 F.2d 637, 641 (10th Cir. 1988); *Ryder v. City of Topeka*, 814 F.2d 1412, 1424 (10th Cir. 1987). A motion for a new trial ultimately invokes the sound discretion of the trial court. *Ryder*, 814 F.2d at 1424.

Discussion

This Court is not persuaded that the jury's verdict is contrary to the great weight of the evidence presented during trial or that its verdict is inconsistent with substantial justice. Defendant's motion simply urges that the Court improperly and incorrectly permitted the case to go to the jury and that the Court should have decided the case on the undisputed facts as a matter of law. This is, of course, an analysis with which plaintiffs disagree. Defendant's arguments, reduced to their most basic form, assert that the Court should substitute its judgment for that of the jury. The parties' legal arguments on both sides reiterate the positions they assumed during the briefings concerning the motions for summary judgment.

Most of the issues raised by defendant in its motion for a new trial challenge the jury's resolution of factual disputes, insofar as the jury was permitted to determine whether the plaintiffs were constructively discharged, which provided the underpinnings for plaintiffs' due process and Section 1983 claims. Quite to the contrary, this Court disagrees that the evidence could have been viewed in only one way so as to compel the conclusion that the evidence was uncontroverted in this case. The

testimony heard by the jury was such that more than one inference could have permissibly been drawn in this case. The function of the trier of fact, the jury, is to make the choices and decisions that are required in such circumstances. The jury did so in this case, and determined that plaintiffs had been constructively discharged and that they were entitled to recover from the defendant. This is exactly what a jury is required to do – determine whether a reasonable person would view the working conditions as intolerable so as to constitute a constructive discharge in the circumstances of this case and, correspondingly, resolve concomitant issues relating to the plaintiffs' Section 1983 and due process claims. The Court persists in and relies upon its earlier discussion regarding Constructive Discharge – Section 1983/Due Process Claims, set forth in its earlier Order on Motions for Summary Judgment, as to the legal issues raised again by the parties in their briefs concerning the instant motion.

It is certainly plausible that the jury could have reached a contrary conclusion upon the evidence that was presented to it during the course of trial and considered by the jury during its deliberations. The jury could have determined these factual disputes in a manner other than it did. However, this Court will not now re-weigh the evidence nor will it substitute its judgment for that of the jury. Granting a new trial would not prevent substantial injustice in the circumstances of the instant case. The Court is not convinced that the judgment of the jury, as reflected in its verdict, should be set aside. Therefore, the defendant's motion for a new trial, as to all issues raised in the motion, will be denied in its entirety. Further, the

Court persists in its prior rulings with respect to plaintiff's tendered jury instructions and evidentiary rulings regarding the admission of evidence, including Exhibit 3 and the testimony of witness Judith Turner. Those issues will not be revisited further in this order.

In accordance with the foregoing, as set forth above, this Court finds that it does not appear that the jury's verdict in this case is inconsistent with substantial justice or that obvious and prejudicial error has crept into the record. Thus, the Court finds that "Defendant Niobrara County Hospital District's Motion for Judgment as a Matter of Law After Trial or, In The Alternative, For a New Trial" should be denied. Accordingly, it is therefore

ORDERED that the "Defendant Niobrara County Hospital District's Motion for Judgment as a Matter of Law After Trial or, In The Alternative, For a New Trial" shall be, and is, **DENIED.**

Dated this 22nd day of October, 1996.

/s/ Alan B. Johnson
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

SARAH YEAROUS and TONYA CRISMAN, Plaintiffs, v. NIOBRARA COUNTY MEMORIAL HOSPITAL, by and through its Board of Trustees, and VICKY WINNEY, Defendants.	)	No. 96-CV-1005-J Consolidated with 96-CV-1006-J (Filed Sep. 11, 1996)
JONELL ROBINSON and CHINTAMINI FRAHM, Plaintiffs, v. NIOBRARA COUNTY MEMORIAL HOSPITAL, by and through its Board of Trustees, and VICKI WINNEY, Defendants.	)	No. 96-CV-1006-J

JUDGMENT

The above captioned matter having come regularly before the Court for a jury trial, and the jury having duly rendered its verdict for the plaintiffs in this matter on

September 6, 1996, finding (1) that each plaintiff was constructively discharged by the defendant Niobrara County Memorial Hospital; (2) after finding that each plaintiff was constructively discharged, the defendant Niobrara County Memorial Hospital; (2) after finding that each plaintiff was constructively discharged, the defendant Niobrara County Memorial Hospital deprived each plaintiff of a property interest in her employment without due process of law; and that each plaintiff was entitled to recover damages for (a) past loss of wages and other lost benefits, (b) future loss of wages and other lost benefits reasonably probable to be experienced by each plaintiff in the future, and (3) damages for emotional distress, mental suffering, and injury to reputation suffered in the past and reasonably probable to be experienced by each plaintiff in the future. It is hereby

ORDERED, ADJUDGED, AND DECREED that the plaintiff, Sarah Yearous, recover the total sum of $113,228.00 ($9,500.00, past loss of wages and other lost benefits; $83,128.00, future loss of wages and other lost benefits reasonably probable to be experienced in the future; $20,600.00, damages for emotional distress, mental suffering, and injury to reputation suffered in the past and reasonably probable to be experienced in the future) from the defendant, Niobrara County Memorial Hospital, by and through its Board of Trustees, plus post-judgment interest thereon at the statutory rate provided by law, 5.67%, and as the prevailing party, her costs and reasonable attorney's fees. It is further

ORDERED, ADJUDGED, AND DECREED that the plaintiff, Tonya Crisman, recover the total sum of $329,044.00 ($32,750.00, past loss of wages and other lost

benefits; $236,494.00, future loss of wages and other lost benefits reasonably probable to be experienced in the future; $59,800.00, damages for emotional distress, mental suffering, and injury to reputation suffered in the past and reasonably probable to be experienced in the future) from the defendant, Niobrara County Memorial Hospital, by and through its Board of Trustees, plus post-judgment interest thereon at the statutory rate provided by law, 5.67%, and as the prevailing party, her costs and reasonable attorney's fees. It is further

ORDERED, ADJUDGED, AND DECREED that the plaintiff, Jonell Robinson, recover the total sum of $276,188.00, ($27,507.00, past loss of wages and other lost benefits; $198,471.00, future loss of wages and other lost benefits reasonably probable to be experienced in the future; $50,200.00, damages for emotional distress, mental suffering, and injury to reputation suffered in the past and reasonably probable to be experience in the future) from the defendant, Niobrara County Memorial Hospital, by and through its Board of Trustees, plus post-judgment interest thereon at the statutory rate provided by law, 5.67%, and as the prevailing party, her costs and reasonable attorney's fees. It is further

ORDERED, ADJUDGED, AND DECREED that the plaintiff, Chintamani Frahm, recover the total sum of $159,177.00 ($21,909.00, past loss of wages and other lost benefits; $108,368.00, future loss of wages and other lost benefits reasonably probable to be experienced in the future; $28,900.00, damages for emotional distress, mental suffering, and injury to reputation suffered in the past and reasonably probable to be experience in the future) from the defendant, Niobrara County Memorial Hospital,

by and through its Board of Trustees, plus post-judgment interest thereon at the statutory rate provided by law, 5.67%, and as the prevailing party, her costs and reasonable attorney's fees.

DATED this 11th/ day of September, 1996.

/s/ Alan B. Johnson
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

I. STATEMENT OF FACTS:

This is not a complicated case. The issues raised by The Niobrara County Memorial Hospital (Hospital) have all been considered and rejected at lest four times by the district court. The facts referenced by Hospital in its brief are insufficient for this court to fairly consider the issues raised. For that reason, Sarah Yearous, Tony Crisman, Jonell Robinson, and Chintamani Frahm, hereinafter collectively referred to as "Appellees", cite the following additional facts developed at the trial. Appellees respectfully submit that the testimony and evidence introduced during the trial overwhelmingly supports the jury's verdict in their favor.

Appellees were all nurses employed by Hospital in July, 1995, when Hospital hired Vicki Winney (Winney) to be the new director of nursing. Winney was hired by Hospital's governing body, its board of directors. The Hospital had a report in its minutes for its June, 1995, Medical Committee meeting, that Winney did not have enough experience to be a director of nursing. Nonetheless, Hospital decided to hire here to fill that position. (Aplt. App. Vol. 5, p. 1221; See also Plaintiffs' Exhibit 40, Aplee. Supp. App. p. 49 at 50).

In hiring Winney, the board of directors made no provision to have anyone supervise Winney while Jeff Struble, Hospital's administrator was gone. (Aplt. App. Vol. 5, pp. 1222, 1224-1227; Vol. 4, p. 178). Nonetheless within several days after Winney was hired, Struble went on vacation for three weeks, leaving no one in charge of Hospital. (Aplt. App. Vol. 5, p. 1226).

Shortly after assuming her new position, Winney began telling appellees and other Hospital staff that it would be an acceptable practice to falsify the admission dates for various patients in order to allow Hospital to bill Medicare for patients who did not qualify for Medicare benefits. Winney described her plan to increase revenues for Hospital to several department heads including Dietary Manager, Jackie Bredthauer, (Aplt. App. Vol. 3, pp. 691-696), and Activities Director, Brenda Baker, (Aplt. App. Vol. 4, p. 917).

The plan included moving patients from Hospital's "nursing home section" to "hospital section" of the facility under Medicare's "swing bed" status. Winney informed the department heads that by moving the patients and changing the admission dates on their charts, the patients would come within Medicare guidelines. This scheme allowed Hospital to double-bill for each patient moved, i.e., bill the families of the patients to maintain the patients' beds in the nursing home section, and, simultaneously, bill Medicare for patients' beds in the hospital section. (Aplt. App. Vol. 4, p. 917).

Winney told hospital staff that it would not be fraud to change admission dates to accomplish this plan. *Id.* Appellee Jonell Robinson testified that she had heard Winney make statements on two separate occasions about falsifying records and backdating records in order to obtain Medicare Funding. (Aplt. App. Vol. 2, pp. 372-375). Appellee Chin Frahm was present on one occasion with Robinson, during which Winney told the nurses that: "all we have to do is change the date." (Aplt. App. Vol. 2, p. 534).

It was undisputed at trial that both falsification of medical records and failure to obey a supervisor were cause for termination under hospital policy. (Aplt. App. Vol. 2, pp. 358, 399, 456; and Aplt. App. Vol. 5, pp. 1254, 1255).

Winney acknowledged that: It would be a very serious thing for a nurse to chart information improperly; a nurse could get into serious trouble for doing so; and that a nurse could be discharged for improper charting. (Aplt. App. Vol. 5, pp. 1065-66). She verified that it was important for a nurse to trust her director of nursing and that, if the director of nursing asked a nurse to improperly chart information, that such a request would affect the nurse's trust of the director of nursing and would create a serious dilemma for the nurse at her job. (Aplt. App. Vol. 5, pp. 1067-68). Winney also agreed that a nurse should not be required to work under a director of nursing who asked her to falsify records or to compromise patient care for monetary reasons. (Aplt. App. Vol. 5, pp. 1067-68).

Significantly, Winney lied to the state inspectors concerning staffing shortages in the presence of Appellee Sarah Yearous. (Aplt. App. Vol. 4, pp. 823-825; Aplt. App. Vol. 5, pp. 1127, 1177). While admitting that she knew it was important for her to tell the truth to the State inspectors, Winney nevertheless gave them false information. When questioned, Winney maintained that the information she gave them was true until the team checked records and established that she was giving false information. (Aplt. App. Vol. 5, p. 1177).

Winney asked Robinson to falsely chart that "Patient A" had been admitted directly from Casper to the hospital bed when when [sic] he had actually been transferred to the hospital bed from a nursing care bed. (Aplt. App. Vol. 2, pp. 371-375). Winney also asked Robinson to falsely change the dates on the chart of "Patient C". (Aplt. App. Vol. 2, pp. 374-375). In both instances the patients would not have qualified for Medicare benefits without falsification of the record.

Chin Frahm also testified that Winney was directing her to falsely change the dates on the chart for "Patient C". (Aplt. App. Vol. 2, p. 534).

Finally, there were serious patient care issues arising from Winney's incompetent nursing practices which scared appellees. Winney not only ignored clearly established hospital policy with respect to care of patients, but she also often acted in complete ignorance of existing hospital policy. She did not follow the hospital policy on deep wound care in the exchange she had with Appellee Frahm. She did not know about the policy, and her way of dealing with the problem with Patient "B" was in direct violation of the deep wound care policy. (Aplt. App. Vol. 5, pp. 1111-1115; See also Plaintiffs' Exhibit 81, Aplee. Supp. App., Vol 1, p. 50).

Winney was also responsible for staffing. Under her supervision Hospital experienced severe staffing problems with some shifts not having adequate help (Aplt. App. Vol. 2, p. 380). These problems arose and were allowed to exist since the board of directors, although aware that Winney did not have enough experience to be director of nursing, nevertheless did nothing to provide

any orientation or guidance to Winney prior to the time that Struble left for three weeks vacation. (Aplt. App. Vol. 4, pp. 923g-933h).

The appellees were afraid for the patients as well as their nursing licenses. The trial testimony indicated that the appellees and the department heads, including the chief of medical staff, Dr. Hawley, were all discussing these matters between themselves during the time Struble was gone and after his return. (Aplt. App. Vol. 2, pp. 389, 406, 408, 409, 536, 537, 549; Vol. 3, p. 182; and Vol. 4, p. 850). Hospital's entire staff was concerned about the way Winney was operating in Hospital.

The appellees and several department heads went to Lori Fields, Hospital's Director of Finance and reported these charting and patient care issues in the hope that the board of directors would intervene (Aplt. App. Vol. 2, p. 384) and provide them with a hearing. Fields relayed the request and concerns regarding charting and patient care issues to board member Ken DeGering and asked him to please meet with appellees. DeGering, however, did nothing in response to the request. (Aplt. App. Vol. 3, pp. 709, 711-712).

After Struble returned, the appellees each submitted a letter of resignation based upon the serious problems occurring at Hospital. Appellees submitted resignations because they were afraid for their patients, their jobs, and they feared that their nursing licenses might be taken away. They each testified that they felt like they had no choice but to resign. (Aplt. App. Vol. 2, pp. 391-396, 478, 545; Vol. 4, pp. 828, 846; Vol. 3, p. 779.)

Struble subsequently conducted an investigation which included a meeting with the Chief of Staff, Dr. James Hawley. At this meeting, Winney told both Struble and Dr. Hawley that it was not that bad of a thing to change dates in medical records and that she did not consider changing dates to being a big deal. She also told Dr. Hawley that this is acceptable nursing practice. (Aplt. App. Vol. 3, pp. 638, 657-658). During the investigation, Winney submitted documentation prepared by her at the time which indicated that she had actually asked Dr. Hawley if it was okay with him to change the dates on a patient's admission record to get him covered by Medicare. (Aplt. App. Vol. 5, pp. 1143, 1144. See also Plaintiff's exhibit 85, memo of Vicki Winney (Aplt. App. Vol. 8, p. 1888). Dr. Hawley confirmed that Winney had made this request. (Aplt. App. Vol. 3, p. 658). At trial Winney changed her story and tried to explain this note by saying that when she wrote down "change dates" she really meant to say "change status." *Id.* at 1145.

As a result of the investigation, Struble fired Winney. The same day she was fired, Winney asked for and was given a hearing with some members of the board of directors. (Aplt. App. Vol. 4, pp. 923k-923n). This was an unscheduled meeting which was held at the home of a board member. (Aplt. App. Vol. 5, p. 1130). The following day the board again met and Struble testified that the board ordered him to re-instate Winney. (Aplt. App. Vol. 5, p. 1207). Thereafter, the board deliberately did nothing to address the concerns of appellees. (Aplt. App. Vol. 5, p. 1261; Vol. 4, pp. 923ff-923gg; and Vol. 6, pp. 1340).

Immediately after Winney was reinstated, the four appellees asked Struble to set up a meeting with the

board. (Aplt. App. Vol. 2, pp. 382, 384, 386; Vol. 3, pp. 775, 780, 807). Appellees' request had no conditions of any kind placed upon it. (Aplt. App. Vol. 2, pp. 401, 545, 546, 596; Vol. 3, p. 709; Vol. 6, pp. 1374, 1376). There were no constraints placed upon the repeated requests by the appellees to Struble as to how many board members were to attend the meeting. Appellee Jonell Robinson did ask for a special meeting, but she testified that she just wanted a hearing right away and did not want to wait for a regularly scheduled meeting. (Aplt. App. Vol. 2, p. 494).

Significantly, Hospital's Chain of Command Policy provided that if an employee wanted to meet with the board, the employee could request the administrator to set up a hearing. (Plaintiff's exhibit 32, Aplt. App. Vol. 8, p. 1887). The specific language of the policy states:

> . . . If you feel that you need to speak to the Board of Trustees, contact the administrator. He *will* set up a meeting. (emphasis added).

Director Wasson testified that the appellees were entitled to at least the same kind of hearing that the board gave Winney after her termination. Aplt. App. Vol. 4, pp. 923n-923y). Board member DeGering also testified that the appellees were entitled to a hearing. (Aplt. App. Vol. 6, p. 1353). The board, however, did not give appellees a hearing. (Aplt. App. Vol. 2, pp. 492-495; Vol. 3, p. 780.)

Three of the appellees, including Robinson, Frahm, and Crisman asked Struble directly for a hearing with the Board on several different occasions prior to their last day on the job. (Aplt. App. Vol. 2, pp. 384, 386, 401, 482, 545, 546, 596; Vol. 3, pp. 709, 775, 780, 807; Vol. 6, pp. 1374, 1376). Appellee Yearous also asked her supervisor

to request a hearing in accordance with Hospital's chain of command which provided that a nurse should bring her concerns to the charge nurse or shift supervisor. (Aplt. App. Vol. 4, p. 82; Exhibit 32, Aplt. App. Vol. 8, p. 1887).

Struble acknowledged that he believed the appellee Robinson was speaking for all the nurses in making her hearing requests. (Aplt. App. Vol. 4, p. 827; Vol. 5, p. 1267). All requests were denied; it is uncontroverted that no hearing was ever given. (Aplt. App. Vol. 3, p. 780). Struble refused to set up a hearing and told the appellees that the board "doesn't want to hear it." (Aplt. App. Vol. 3, p. 775). He also told appellees that the board was not interested in what they had to say. (Aplt. App. Vol. 3, p. 807. Struble acknowledged that the appellees told him that they felt that their licenses were in jeopardy. (Aplt. App. Vol. 6, p. 1282).

Appellees submitted their resignations in August, 1995. Thereafter a majority of the supervisory staff and the Hospital Chief of Staff signed a memo which indicated that they each believed that the appellees had no choice but to resign because they had serious concerns which were being ignored by the board. The memo was presented at an open board meeting on August 21, 1995. (Aplt. App. Vol. 8, No. 51, pp. 1846-47). At this meeting one of Winney's friends, Dr. Paul Long, was allowed to yell, scream and intimidate the department heads who had submitted the memo. (Aplt. App. Vol. 3. pp. 645-648, 695).

The meeting clearly got out of hand and was not conducted in executive session. After the meeting,

appellees were advised by the department heads concerning how the meeting was conducted. The department heads also informed the nurses that the board was not taking their concerns seriously. (Aplt. App. Vol. 3, pp. 694-696). The board did not respond to the memo or the complaints of the department heads.

In September, 1995, the month following the appellees' resignations, Struble told them that they could come to a regular board meeting if they wanted to talk to the board. (Aplt. App. Vol. 2, pp. 407, 482). At that time appellees advised him that they were afraid to come to a regular board meeting for fear of another incident by Dr. Long. (Aplt. App. Vol. 6, pp. 1282, 1286, 1374). Although Struble acknowledged that the appellees had advised him that they were afraid to come to an open meeting like the meeting on August 21. (Aplt. App. Vol. 6, p. 1374), he did nothing to alleviate appellees' fears. Appellees were never offered or given a hearing, despite their repeated requests.

The parties stipulated and the district court, in adopting their stipulation, specifically found that each of the four appellees had a constitutionally protected property interest in her job:

> "At the final pretrial conference, defendants conceded that plaintiffs do have a protected property right in their employment at the hospital arising out of an implied contract of employment."

(Aplt. App. Vol. 1, No. 15, p. 107, Order on Motions for Summary Judgment, p. 114, footnote 3). During the trial the district court reaffirmed the fact that the appellees

had a property interest in their employment. (Aplt. App. Vol. 4, p. 492).

Importantly, both of the expert witnesses called by the Hospital conceded that if the appellees were telling the truth, they had no choice but to resign. Hospital's expert witness, Ruth Schmidt, testified that changing dates in a chart was unethical and illegal. She further acknowledged that even the suggestion of changing a date in a chart would cause her concern as a nurse. (Aplt. App. Vol. 6, pp. 1304-1306). Sandy Vore, the director of nursing at the Converse County Hospital in Douglas, also testified as an expert for Hospital. She testified that although backdating records to obtain Medicare funding would indeed be "possible" that, "I imagine you would be able to, but I definitely wouldn't suggest it unless you want to go to the Lusk women's prison. You know, that's not something you do." (Aplt. App. Vol. 3, p. 747).

Shirley Wasson, a member of the board of directors testified that, if what the appellees said happened actually happened, no reasonable nurse should be expected to work under such conditions. (Aplt. App. Vol 4, pp. 191, 192). Most significantly, Winney did not deny that she actually asked the appellees to backdate records. Rather, she could only say that she didn't remember having those conversations, but that she may have. (Aplt. App. Vol. 5, pp. 63, 64).

Significantly, Winney admitted that it was important for the nursing staff to be able to trust the director of nursing and that, if the director of nursing asked nurses to improperly chart information, the nurses' trust could be affected. She agreed that this would put any nurse in a

pretty serious dilemma and would make the nurses' job pretty difficult. (Aplt. App. Vol. 5, pp. 1067-68). She also admitted that no nurse should be required to work under a director of nursing who asked her to falsify records or who asked her to compromise patient care to save money. (Aplt. App., Vol 5, p. 1168). Winney testified that, when she went back to work after being fired that she knew that the appellees had voiced concerns about whether they could have a good working relationship with her and that she did nothing to resolve those concerns. (Aplt. App. Vol. 5, p. 1131).

During the progression of the case, the district court was repeatedly asked to review the legal and factual contentions of the parties. Early on, Hospital filed a Motion for Summary Judgment, requesting that the district court dismiss each count of the appellees' causes of action. (Aplt. App. Vol. 1, No. 8, pp. 61-a). The appellees filed their own Motion for Partial Summary Judgment (Aplee. Supp. App. at p. 1), asking the district court to find that each of them had an implied contract of employment which was terminable only for cause and to find that the facts supported a finding by the district court that each of the nurses had been constructively discharged.[1]

Although the district court dismissed appellees' counts alleging intentional infliction of emotional distress, breach of the implied covenant of good faith and

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[1] The Appellees' Motion For Partial Summary Judgment also asked for a finding that they had a property interest in their employment with the hospital. Hospital later admitted that a property interest existed.

fair dealing, promissory estoppel and entitlement to punitive damages, it also found that appellees had an implied contract of employment which was terminable only for cause. However, the district court denied appellees' requests that it rule that they were each constructively discharged, finding instead that there were genuine issues of material fact on that point.

It is interesting to note that Hospital does not contend on appeal that any of the district court's rulings in its favor were in error, indicating that Hospital felt the district court had a sufficiently good command of the facts and law in the case, at least in those instances in which it ruled in favor of Hospital.

The parties proceeded to trial on each of the remaining claims. At trial, Hospital did not object to Instruction 11, (Aplt. App. Vol. 1, No. 28, p. 2550), which included the statement that:

> " . . . The policies and procedures adopted by the Hospital created what is known in the law as an implied contract of employment. As a result of this implied contract, the plaintiffs were each entitled to continuing employment at the Hospital as permanent employees. This means that they could not only be terminated for cause as described in the Hospital's policies.
>
> Each of the plaintiffs contends that she was the subject of a constructive discharge by the defendants, meaning that the working conditions at the Hospital became so difficult for her that a reasonable person would feel compelled to resign and that by the actions of the defendants, they were effectively discharged in violation of the implied contract of employment.

Because of the implied contract of employment and because the plaintiffs were employed by a governmental entity, the United States Constitution provides that they could not be deprived of their jobs without due process of law."

Nor did Hospital object to Instruction 14 or to Instruction 20:

"Defendant has the burden of proving by a preponderance of the evidence its defenses that any particular plaintiff voluntarily resigned and that any particular plaintiff failed to mitigate her damages". (Aplt. App. Vol. No. 28, p. 260.)

"In this case, the Court has determine that defendant Niobrara County Memorial Hospital's personnel policies constituted an agreement that it would not discharge employees except for just cause". (Aplt. App. Vol. 1, No. 28, p. 266).

Most significantly, Hospital did not object to Instruction 23 (Aplt. App. Vol. 1, No. 28, p. 268) which set forth the elements of appellees' constructive discharge claims relating to breach of contract:

First: That she was permanently employed by the defendant Niobrara County Memorial Hospital;

Second: That a reasonable person would have viewed the working conditions at the hospital as so intolerable that the employee plaintiff would have no other choice but to quit;

Third: That as a result of the constructive discharge, she suffered damage.

You are instructed that the Court has determined that each of the plaintiffs was permanently employed by defendant Niobrara County Memorial Hospital, and therefore, you are to consider that the first element set out in this instruction has been proved.

Similarly, Hospital did not object to Instruction 27 (Aplt. App. Vol. 1, No. 28, p. 272) which instructed the jury that:

"In order to recover from defendant Niobrara County Memorial Hospital for a deprivation of civil rights, plaintiffs must prove that the actions of the Board of Trustees constituted a deliberate deprivation of plaintiffs' constitutional rights. Mere negligence is not sufficient to sustain a claim for deprivation of civil rights".

The verdict form included special interrogatories for each appellee:

1. Was plaintiff ___ constructively discharged by the defendant, Niobrara County Memorial Hospital?

2. If you found that plaintiff ___ was constructively discharged, did defendant Niobrara County Memorial Hospital deprive her of a property interest in her job without due process of law?

3. What sum of money, if any, will fairly compensate plaintiff ___ for her monetary losses:

   a. Past loss of wages and other lost benefits?

b. Future loss of wages and other lost benefits reasonably probable to be experienced by the plaintiff ___ in the future?

c. Damages for emotional distress, mental suffering, and injury to reputation suffered in the past and reasonably probable to be experienced in the future?

(Aplt. App. Vol. 1, No. 28, pp. 299-305).

The jury found that Hospital had constructively discharged each appellee, that Hospital had deprived each appellee of a property interest in her job without due process of law, and that each appellee was entitled to monetary compensation. (Aplee. Supp. App. Vol. 1, p. 59 at 61-65).

* * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

SARAH YEAROUS and TONYA CRISMAN, Plaintiffs, v. NIOBRARA COUNTY MEMORIAL HOSPITAL, by and through its Board of Trustees, and VICKIE WINNEY, Defendants.	)	No. 96-CV-1005-J Consolidated with 96-CV-1006-J

JONELL ROBINSON and CHINTAMANI FRAHM, Plaintiffs, v. NIOBRARA COUNTY MEMORIAL HOSPITAL, by and through its Board of Trustees, and VICKI [sic] WINNEY, Defendants.	)	No. 96-CV-1006-J

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

(Filed Aug. 21, 1996)

The parties' cross motion is for summary judgment came before the Court for consideration, having been submitted to the Court on the briefs of the parties. The

Court, having considered the motions, the materials filed by the parties in support of their respective positions, and being fully advised in the premises, FINDS and ORDERS as follows:

Background

Plaintiffs were all employed by Niobrara County Memorial Hospital in Lusk, Wyoming as nurses during the summer of 1995. In July of 1995, the hospital hired defendant Winney to be the new Director of Nursing ("DON"). Shortly after Winney was hired to be the new director, plaintiffs claim she asked two of the plaintiff nurses to assist her in falsifying medical records at the hospital in an attempt to obtain Medicare funding for certain patients. Winney also directed several of the nurses to perform medical procedures which were below the standard of care required of nurses. Plaintiffs claim they reported the problems with Winney to the Board of Trustees and to the Administrator of the Hospital. They were concerned that by working under Winney they were placing their nursing licenses in jeopardy and would also compromise patient care and safety. Ultimately, the nurses tendered their resignations to the Administrator and advised him that they would return to work only if Winney was removed as Director. The administrator conduced an investigation and then fired Winney from her position as DON after determining that she was having a detrimental effect on morale in the hospital. On the day she was fired, Winney requested a hearing with the Board of Trustees of the hospital. That same day, an informal meeting was held between Winney and the Board at the residence of one of the Board members. The plaintiff

nurses were not present for the meeting, nor was the administrator. The next day, the Board directed the Administrator to rehire Winney without doing any independent investigation to determine the extent of the problems that were being created by Winney for the staff at the hospital. The plaintiffs requested a hearing before the Board so that they could address these problems, but the Board would not give them any meaningful opportunity to do so. They sought to have an informal meeting where they would have been free to discuss their concerns without pressure from outside actors who supported Winney. They were advised to attend a formal Board meeting if they desired to discuss these matters and concerns with the Board.

Plaintiffs contend they were constructively terminated by the Board's refusal to listen to their concerns about Winney's activities as Director of Nursing and the board's refusal to correct the problems that Winney created for the Plaintiffs. The plaintiffs assert in their complaint that the activities of the defendants constitute a breach of employment contract between the nurses and the hospital, that they were denied due process of law by the Board's failure to give them a fair meaningful hearing and also violated their free speech rights, that the defendant's conduct caused severe emotional distress to the plaintiffs, that defendants breached the implied duty of good faith and fair dealing in reinstating Winney without doing any investigation or taking any remedial actions to protect plaintiffs' nursing licenses by refusing to meet with plaintiffs and by failing to implement correctional procedures for the problems created by Winney. They also contend the actions of the defendants violated the

public policy of the state of Wyoming, that defendants' actions were willful and wanton and with reckless disregard for the rights of the plaintiffs.

Their [sic] have asserted claims for relief including claims for relief under 42 U.S.C. § 1983 asserting deprivations of property rights without due process and deprivations of free speech rights,[1] a retaliation claim for violations of 42 U.S.C. 2000(e)(3), state law claims for breach of contract (against the hospital), promissory estoppel, interference with contract (against defendant Winney), intentional infliction of emotional distress (against defendant Winney and Niobrara County Memorial Hospital), breach of the implied covenant of good faith and fair dealing (all defendants), violations of public policy (all defendants). They see compensatory and punitive damages.

Plaintiffs withdrew their claims against defendants under 42 U.S.C. § 2000e-3 and for tortious interference with contract,[2] and accordingly, claims will be dismissed.

Defendants do not agree with most of the allegations plaintiffs have made in this case. However, at the final pretrial conference the parties agreed that the following facts are uncontroverted:

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[1] At the final pretrial conference, counsel for plaintiffs indicated that the free-speech based § 1983 claims had been withdrawn.

[2] *See* Plaintiffs' Memorandum of Points and authorities in Opposition to the Defendants' Motion for Summary Judgment at page 24.

(a) Niobrara County Memorial Hospital District ("Hospital") is located in Lusk, Wyoming and is organized pursuant to Wyo. Stat. § 35-2-401 *et seq.*

(b) This district court has jurisdiction over all parties in this matter.

(c) The Hospital facility consists of nursing home and hospital facilities. First level supervisory responsibilities over the nursing staff and nursing assistants employed with the district has been historically held by a single Director of Nursing ("DON").

(d) Defendant Vickie Winney was hired as DON on July 10, 1995.

(e) Prior to Vickie Winney being hired, plaintiffs Crisman and Robinson had acted as temporary co-directors of nursing until August, 1994. They were also fulfilling the duties and responsibilities of the DON position on a temporary basis immediately prior to Vickie Winney being hired on July 10, 1995.

(f) Jeff Struble was the administrator of the Hospital. He was on vacation from July 15 through August 6, 1995.

(g) On August 9, 1995, plaintiffs submitted their letters of resignation. Their last day of work was on or before August 22, 1995.

(h) On August 10, 1995, defendant Vickie Winney was released from her employment.

(i) During the evening of August 10, 1995, Vickie Winney met with the Board of Directors.

(j) On August 11, 1995, the Board met with Jeff Struble.

(k) The Hospital Personnel Policies and Procedures Manual applied to all four plaintiffs.

(l) The Hospital Personnel Policies and Procedures Manual lists a variety of events that can be considered cause for termination including improper charting and failing to do assigned tasks.

Other than these basic facts, most of the facts underlying plaintiffs' claims are at issue.

Defendants have generally denied plaintiffs claims and have asserted that their intentional infliction of emotional distress claims are barred by the Workers' Compensation Act; that their due process claims are barred by the doctrines of waiver and estoppel; and that plaintiffs have failed to mitigate their damages.

Defendants assert that plaintiffs voluntarily resigned without any adverse personnel action being taken against them and that there was no constructive discharge. They allege plaintiff Yearous made no complaint and gave no reason for her resignation; that plaintiff Crisman, who worked only 4-8 days under defendant Winney, had no adverse personnel action taken against her; that plaintiff Robinson's allegations of being asked to falsify medical records are based on miscommunication and that her disagreement with Winney's management style does not give rise to constructive discharge; and plaintiff Frahm's disagreement with nursing practices also does not give rise to constructive discharge and that her belief that she

had been asked to falsify medical records was based on miscommunication.

As to the civil rights claim, defendants argue that plaintiffs were not constructively discharged and are not entitled to claim violations of civil rights. They claim plaintiffs were not denied any due process when they voluntarily resigned, that plaintiffs had no established protected property interest,[3] that they refused to meet with the full board of Trustees, had no adverse personnel actions take [sic] against them and are unable to establish any instance where they were prevented from exercising protected free speech.[4] Defendant Winney argues she acted in good faith and is entitled to qualified immunity.

Defendants contend that state law bars recovery of punitive damages against a governmental entity. The defendant's alleged conduct does not rise to the level of outrageousness required to recover for intentional infliction of emotional harm. Plaintiff's voluntary resignations do not give rise to claims for breach of the implied covenant of good faith and fair dealing and that no special relationships exist. Their resignations do not give rise to a claim of violation of public policy and there are ample other remedies available to them.

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[3] At the final pretrial conference, defendants conceded that plaintiffs do have a protected property right in their employment at the hospital arising out of an implied in fact contract of employment. It appears that with this concession, the defendants' contention that there is no contract of employment has been withdrawn and the Court will proceed hereafter on that basis.

[4] As noted earlier, the free speech claims are moot, having been withdrawn by plaintiffs.

Standard of Review
Motions for Summary Judgment

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits on file, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law." The moving party has the burden of showing the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The moving party's burden may be met by identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S 317 (1986). In determining whether these burdens have been met, the court is required to examine all evidence in the light most favorable to the non-moving party. *Barber v. General Electric Co.*, 648 F.2d 1272 (10th Cir. 1981).

Once the moving party has met its initial burden, the burden shifts to the party resisting the motion. That party must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Manders v. Oklahoma ex rel. Dept. of Mental Health*, 875 F.2d 263, 265 (10th Cir. 1989) citing *Celotex*, 477 U.S. at 325.

Discussion

Each of the parties have recited facts that support their respective positions, and given selective emphasis to certain facts, while electing to ignore or de-emphasize

other facts. The parties' versions of many of the underlying facts in this case are in hopeless conflict. These fundamental disputes of material fact require entry of an order denying summary judgment, generally, to either party. Without elaborating further, the Court finds that genuine issues of material fact do exist and that neither party is entitled to summary judgment, except as outlined specifically in the subsequent portions of this order.

However, with respect to certain claims asserted by plaintiffs in their complaint, the Court does believe that summary judgment is appropriate, even in the face of considerable factual disagreement. Specifically, whatever version of the facts is to be believed, this Court believes that the plaintiffs' claims for intentional infliction of emotional distress, promissory estoppel, breach of the covenant of good faith and fair dealing, and for punitive damages fail and defendants' are entitled to judgment as a matter of law on those claims. Each claim will be addressed separately as appropriate.

Intentional infliction of emotional distress

The tort of intentional infliction of emotional distress "occurs when '[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. . . . ' " *Gustafson v. Bridger Coal Co.*, 834 F.Supp. at 355 (quoting from *Leithead v. American Colloid Co.*, 721 P.2d 1059, 1065 (Wyo. 1986), which also cites Restatement (Second) of Torts § 46 (1965)).

> In order to maintain an action for intentional infliction of emotional distress, there must be outrageous conduct "which goes beyond all

> possible bounds of decency, is regarded as atrocious, and is utterly intolerable in a civilized community." [*Leithead v. American Colloid Co.*, 721 P.2d] at 1066. For the plaintiff to recover for intentional infliction of emotional distress, the distress inflicted must be so severe that no reasonable person could be expected to endure. *Id.* at 1066, 1067.

Ball v. City of Cheyenne, 845 F.Supp. 803, 814 (D.Wyo. 1993).

Recovery will be permitted for this tort only when "emotional distress, which includes reactions such as shame, humiliation, embarrassment and worry, is extreme." *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211, 223 (Wyo. 1994). The court determines, as a matter of law, whether the conduct of the tortfeasor is so extreme and outrageous that recovery should be permitted. *Id.*

The Court has reviewed the materials submitted in support of and in opposition to the parties' motions. Applying the standard of review for motions for summary judgment, examining all evidence in the light most favorable to the plaintiffs, the non-moving parties on this particular issue, the Court is not persuaded that defendants' conduct, as alleged by the plaintiffs, is so egregious that the plaintiffs can prove their claim for intentional infliction of emotional distress.

For example, plaintiffs have asserted that defendant Winney was hired as DON by the hospital board when the board was under extreme pressure from the State of Wyoming to hire a DON. After she was hired, plaintiffs assert that Winney would attempt to fill hospital beds so

as to maximize monies that could be obtained from Medicare programs. To assist in achieving that goal, plaintiffs assert that Winney requested them to lie about patient matters on official hospital records. They also assert the nursing staff was instructed to avoid "sterile procedures" in order to save money. Plaintiffs claim that, following their consciences and out of concern for patient safety and in an effort to adhere to the ethics of their profession and the law, that they were compelled in the circumstances to quit their jobs. They maintain that their concerns were not taken seriously by the hospital board. They assert that their concerns about the conditions of employment were not mere insults, indignities, annoyances, petty oppressions or other trivialities. The evidence is, at best, equivocal. This is not sufficient, as a matter of law, to support a claim for intentional infliction of emotional distress.

Breach of the implied covenant of good faith and fair dealing

Notwithstanding the extant factual disputes, the Court concludes that defendants' are entitled to summary judgment on plaintiffs' claims for breach of the implied covenant of good faith and fair dealing (as to all defendants). The Wyoming Supreme Court, in *Garcia v. Uniwyo Federal Credit Union*, Slip Op., No. 95-86, Text at 1996 WL 346869 (Wyo. 1996), stated the following:

> All contracts of employment in Wyoming contain an implied covenant of good faith and fair dealing, but we limit actions upon such covenants to those rare and exceptional cases

where a special relationship has been demonstrated between employer and employee. *Wilder [v. Cody Country Chamber of Commerce,]* 868 P.2d [211], at 220-22 [Wyo. 1994]. The implied covenant of good faith and fair dealing may, upon demonstration of a special relationship, serve to redress the inherent imbalance between corporations and individual employees. *Wilder*, 868 P.2d at 221; *McCullough v. Golden Rule Ins. Co.*, 769 P.2d 855, 858 (Wyo. 1990).

Usually, the special relationship giving employees an action on the implied covenant of good faith and fair dealing stems from a long term employment relationship coupled with a discharge calculated to avoid employer responsibilities to the employee, e.g., benefits or commissions. *See Fortune v. National Cash Register Co.*, 737 Mass. 96, 364 N.E.2d 1241, 1257 (1977); *K Mart Corp. v. Ponsock*, 103 Nev. 39, 732 P.2d 1364, 1366-69 (198) [sic]. The duration of an employment relationship over a period of years is not sufficient, alone, to give rise to a special relationship. We are aware, however, of no case in which such a special relationship has ripened over a period of mere months. *See, e.g. D'Angelo v. Gardner*, 107 Nev. 704, 819 P.2d 206, 215 (1991).

Employed for just over six months prior to termination, Garcia could hardly leverage a self-initiated coffee Klatsch with sundry Board and Supervisory Committee members into the basis of a special relationship. Further, there is no evidence that UniWyo used Garcia's termination to avoid benefits earned under the contract of employment. *Wilder*, 868 P.2d at 222.

The instant case is not the type of case that the Wyoming Supreme Court contemplated in the discussions set out in the foregoing passages concerning the implied covenant of good faith and fair dealing. There is no special relationship; there is simply no evidence that indicates the employer's actions were taken to avoid benefits earned under a contract of employment. Accordingly, the defendants are entitled to summary judgment on plaintiffs' claims for violations of the implied covenant of good faith and fair dealing.

Promissory Estoppel

The elements of a promissory estoppel claim include: (1) a clear and definite agreement; (2) proof that the party urging the doctrine acted to its detriment in reasonable reliance on the agreement; and (3) a finding that the equities support the enforcement of the agreement. *Lavoie v. Safecare Health Service, Inc.*, 840 P.2d 239, 249-250 (Wyo. 1992); *Garcia v. Uniwyo Federal Credit Union*, Slip Op., No. 95-86, Text at 1996 WL 346869 (Wyo. 1996). Whichever version of the facts is accepted in this case, it is clear that plaintiffs have not proven their claim for promissory estoppel. There is no agreement; there is no evidence that any plaintiff acted to her detriment on any sort of agreement at all. Accordingly, the defendants are entitled to summary judgment on plaintiffs' promissory estoppel claims.

Punitive damages

Wyo. Stat. § 1-39-103(a) provides the following applicable definitions:

> (i) "Governmental entity" means the State, University of Wyoming, or any local government;
>
> (ii) "Local government" means cities and towns, counties, school district, joint powers boards, airport boards, public corporations, community college districts, special districts and their governing bodies, all political subdivisions of the state, and their agencies, instrumentalities and institutions[.]

Niobrara County Memorial Hospital is a hospital district organized pursuant to Wyo. Stat. § 35-2-402 *et seq.* As a hospital district, it is a governmental entity, as defined by Wyo. Stat. § 1-39-103 above. Punitive damages are not recoverable from a governmental entity. Wyo. Stat. § 1-39-118(d).[5] Accordingly, the defendant Hospital is entitled to summary judgment on plaintiffs' claims for punitive damages.

As to defendant Winney, the Court believes that punitive damages are likewise not recoverable of her in this case. Punitive damages are "usually proper only in cases where wanton and willful misconduct is alleged." *Verschoor v. Mountain West Farm Bureau Mutual Ins. Co.*, 907 P.2d 1293, 1301 (Wyo. 1995), quoting *Danculovich v. Brown*, 593 P.2d 187, 191 (Wyo. 1979). "Wanton and willful conduct 'must be more than mere mistake resulting from inexperience, excitement or confusion, and more than

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[5] Wyo. Stat. § 1-39-118(d) provides:

(d) No judgment against a governmental entity shall include an award for exemplary or punitive damages, for interest prior to judgments or for attorney's fees.

mere thoughtlessness or inadventure, or simple inattention.' " *Id.* The Wyoming Supreme Court has stated:

> " * * * Punitive damages are not a favorite of the law and are to be allowed with caution within narrow limits. . . . Since the purpose of punitive damages is not to compensate a plaintiff, but to punish a defendant and deter others, such damages are to be awarded only for conduct involving some element of outrage, similar to that usually found in crime. Restatement (Second of Torts § 908 Comment B (1979). The purpose of punitive damages is not to provide a windfall to plaintiffs and their attorneys, but is to publicly condemn some notorious action or inaction on the part of the defendant. . . .
>
> "We have approved punitive damages in circumstances involving outrageous conduct, such as intentional torts, torts involving malice and torts involving willful and wanton misconduct. Punitive damages are not appropriate in circumstances involving inattention, inadvertence, thoughtlessness, mistake, or even gross negligence. . . .
>
> * * *
>
> "Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know that such conduct would, in a high degree of probability, result in harm to another." . . .

Mayflower Restaurant Co. v. Griego, 741 P.2d 1106, 1115 (Wyo. 1987) (citations omitted).

Having carefully reviewed the pleadings and the materials in support of and in opposition to the motion for summary judgment, the Court finds that the "element of outrage" that is requisite to an award of punitive damages is absent in this case. *Verschoor v. Mountain West*, 907 P.2d at 1301. Therefore, plaintiffs' claims for punitive damages against all defendants, including defendant Winney individually, must fail.

Constructive discharge – Section 1983/Due Process Claim

The constructive discharge claim is at the heart of plaintiffs' substantive claims in this case. Analysis of this claim will be relevant to disposition of the plaintiffs' contract claims as well as the Section 1983 due process claims.

Where an employee has a protected property interest,[6] a constructive discharge may exist when:

> " 'a reasonable [person] would view the working conditions as intolerable' " and when the "working conditions [are] so difficult that a reasonable person in the employee's position would feel compelled to resign." *Derr v. Gulf Oil*

---

[6] There is no dispute in this case, as was made clear by counsel at the final pretrial conference, that the plaintiffs in this case do have a protected property interest in their employment. There is agreement that a contract of employment exists and that plaintiffs were employees who could only be terminated or discharged for cause. There may be some confusion in this regard as the parties briefed the contract issues in their moving papers and, prior to the final pre-trial conference, it was not entirely clear that defendants had in fact conceded the existence of a contract of employment.

> *Corp.*, 796 F.2d 340, 344 (10th Cir. 1986) (applying constructive discharge in a Title VII Case) (citation omitted); *see also Irving v. Dubuque Packing Co.*, 689 F.2d 170, 173 (10th Cir. 1982) ("[A] constructive discharge occurs when an employer deliberateiy makes or allows the employee's working conditions to become so intolerable that the employee *has no other choice* but to quit.") (emphasis added)

Woodward v. City of Worland, 977 F.2d 1392, 1401 (10th Cir. 1992). *See also Spulak v. K Mart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990). There must be "aggravating factors" that make staying on the job intolerable. *James v. Sears, Roebuck and Co., Inc.*, 21 F.3d 989, 992 (10th Cir. 1994), citing *Cockrell v. Boise Cascade Corp.*, 781 F.2d 173, 177 (10th Cir. 1986).

Here, because of the conflicting versions of the underlying facts, the Court must deny the defendants' motion for summary judgment insofar as it seeks a determination that there was no constructive discharge in this case. The plaintiffs' have argued that the working conditions were so bad and that defendant Winney's conduct was so egregious that they simply had no choice but to resign in the circumstances. They believed that defendant Winney's requests, if followed, would have required them to violate established law and hospital policy and would have put their nursing licenses in jeopardy. Being asked to violate the law and being compelled to resign to protect their nursing licenses can be considered as aggravating factors that would render continued employment intolerable and would cause employment conditions to be more than merely unpleasant. Examining plaintiffs' offered evidence in the light most favorable to them as

the non-moving parties, the Court finds that there are genuine issues of material fact that preclude entry of summary judgment and that the jury should be entitled to determine whether the plaintiff-employees were constructively discharged in this instance.

However, that does not end the analysis. Under plaintiffs' claims, if indeed a constructive discharge has occurred, the question then becomes, particularly in the context of their Section 1983 – due process claims, what is the due process the plaintiffs entitled to in the circumstances. Under the law, a public employee who has a protected property interest in continued employment is entitled to certain due process protections. Due process requires that the employer provide an "adequate opportunity to challenge the deprivation of any protected interest [the employee] might have had in his employment." *Walker v. Elbert*, 75 F.3d 592, 597 (10th Cir. 1996). Wyoming case law likewise provides that once a property interest is created due process rights will attach. *Abell v. Dewey*, 847 P.2d 36 (Wyo. 1993), citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *see also Abell v. Dewey*, (on rehearing) 870 P.2d 370, 372 (Wyo. 1994).

Plaintiffs rely on the hospital's policies and procedures manual to outline the nature of their claimed due process rights and define the contours of the procedure they believe they are entitled to. They argue they were entitled to rely on the guidelines set forth in that document, including the progressive stages of discipline and the existing grievance procedure they attempted to make use of in bringing their concerns before the Board and the hospital administrator. The plaintiffs' further argue that

their resignations from their employment as nurses at the Hospital were so involuntary that they amounted to constructive discharges and their resignations were therefore caused without due process. The Tenth Circuit has stated that the voluntariness of a decision to resign should be considered. *See e.g., Parker v. Board of Regents of the Tulsa Junior College*, 981 F.2d 1159, 1162 (10th Cir. 1992) (discussing, in a slightly different context, when a resignation will be involuntary and coerced). If a resignation was so involuntary that it amounts to a constructive discharge, a deprivation of a protected property interest without due process may have occurred. *Id.*

The Court declines to determine whether plaintiffs received all the process that they were due, under the dictates of *Loudermill* and its progeny, on the incomplete state of the record that is now before the Court. Because there are genuine issues of material fact, summary judgment cannot be granted in favor of either party. This Court concludes that the jury should determine all questions of fact in this regard and that the jury should be permitted to draw whatever inferences may be drawn appropriately from the evidence and testimony presented to them during the course of trial.

Public Policy Claim

Plaintiffs assert public policy violations, including being requested to falsely chart information in an effort to increase the hospital's Medicare funding and to use patient procedures that could compromise patient care. Defendants state that these matters are simply matters of "miscommunication." Unquestionably, it is not the public

policy of the state of Wyoming to seek to obtain funding for public facilities through violations of federal and state law. However, whether or not that occurred in this case is clearly a factual dispute. On the record now before the Court, the Court concludes that genuine issues of material fact exist and that summary judgment in favor of the defendants on this claim should be denied.

Accordingly, and for the foregoing reasons, it is therefore

ORDERED that defendant's Motion for Partial Summary Judgment shall be, and is, **GRANTED IN PART** and **DENIED IN PART**. It is further

ORDERED that defendants are entitled to judgment in their favor on plaintiffs' claims for (1) intentional infliction of emotional distress, (2) breach of the implied covenant of good faith and fair dealing, (3) promissory estoppel, and (4) punitive damages. It is further

ORDERED that plaintiffs' motion for partial summary judgmetn [sic] shall be, and is, **GRANTED** on their claims for implied contracts of employment terminable only for cause and **DENIED** to the extent that it seeks a determination that plaintiffs' were constructively discharged or terminated from their employment and on their due process claims for the reasons that there are genuine issues of material fact. It is further

ORDERED that plaintiff's claims, as to all defendants, for tortious interference with contract, for 42 U.S.C. § 1983 – free speech claim, and for retaliation, pursuant to 42 U.S.C. § 2000e-3, shall be, and are, **DISMISSED**. It is further

ORDERED that the parties shall be prepared to proceed to trial on all remaining claims on August 26, 1996 in Casper, Wyoming at 9:30 a.m., as presently scheduled.

Dated this 20th day of August, 1996.

/s/ Hon. Alan B. Johnson
CHIEF JUDGE UNITED
STATES DISTRICT COURT

Supreme Court, U.S.
FILED
MAR 12 1998
CLERK

(2)

No. 97-1332

In The

Supreme Court of the United States

October Term, 1997

SARAH YEAROUS, TONYA CRISMAN, JONELL ROBINSON, and CHINTAMANI FRAHM,

Petitioners,

v.

NIOBRARA COUNTY MEMORIAL HOSPITAL, By and Through its Board of Trustees,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does Petitioners' disagreement with the Tenth Circuit's characterization of the record warrant discretionary review by the United States Supreme Court?

2. Does Petitioners' claim of a conflict between the Circuits as to the elements of constructive discharge present an issue warranting review?

3. Can Petitioners raise an issue for discretionary review in this Court when they have failed to raise that issue at any time below?

STATEMENT AS TO PARTIES

Pursuant to Supreme Court Rule 29.6, all parties are set forth in the caption. Respondent's correct name is Niobrara County Hospital District. It is a governmental entity organized pursuant to Wyo. Stat. § 35-2-401 et seq. There are no parent or nonwholly owned subsidiaries of this governmental entity.

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Supreme Court Rule 10 9

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Niobrara County Hospital District (Hospital) respectfully prays that this Court deny the request of Petitioners to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on October 21, 1997.

I. INTRODUCTION

This case involves claims of constructive discharge arising under 42 U.S.C. § 1983 and State contract law. Petitioners obtained a jury verdict against Respondent on both theories, and the District Court entered judgment on the verdict in their favor. The Tenth Circuit reversed, holding that there was insufficient evidence to sustain the verdict as a matter of law and that the Petitioners voluntarily resigned rather than being constructively discharged from their employment at Respondent hospital.

Petitioners claim that the Tenth Circuit erred in three general respects. They claim that the Tenth Circuit erroneously found that there was no legally sufficient evidentiary basis for the jury's verdict when viewing the record in the light most favorable to them. Petitioners also claim that there is a conflict between the Circuits as to the definition of constructive discharge. Finally, they claim for the first time in their petition that there is a distinction between the definition of constructive discharge under a State law contract claim and a Federal civil rights claim based on a claimed deprivation of a property interest without due process.

II. PETITIONERS MISSTATE THE RECORD BELOW

Petitioners set forth their perception of the facts of this litigation rather than the facts of record. The relevant facts are set forth in the Tenth Circuit's opinion. (see Petition Appendix A pp. A-3 through A-10). The issue in this case is whether Petitioners were constructively discharged from their employment as nurses at Respondent Hospital. Petitioners voluntarily submitted their resignations on August 9, 1995. Their voluntary resignation relinquished any property interests they may have had in continued employment and they were therefore as a matter of law not deprived of a property interest without due process of law. For the same reason, the record did not support a claim for breach of an implied contract by constructive discharge.

Petitioners argue that this case involves an attempt to defraud Medicare, and therefore a brief summary of the facts which relate to Petitioners' fanciful assertion is warranted. The Hospital is a small rural health care facility located in Lusk, Wyoming. The facility includes a ten bed hospital and a thirty-six bed nursing home. A Director of Nursing supervises the nursing staff of the facility.

In the Spring of 1995, the director of nursing position became vacant. After conducting a search to fill the position, the Hospital hired the only remaining candidate, Vickie Winney. Winney started her new position on July 10, 1995.

On July 12, 1995, Patient A was transferred from the Wyoming Medical Center located in Casper, Wyoming. The patient was improperly admitted to the Lusk nursing home without a doctor's order. The patient was then

transferred to a "swing" bed[1] in the hospital portion of the facility by a staff doctor. Winney and Petitioner Robinson disagreed over how to document the transfer of the patient from the nursing home to the hospital. Winney felt that because the patient was improperly admitted to the nursing home, the documentation should reflect the patient was transferred directly from Casper to the hospital "swing" bed. Robinson insisted on charting the patient as coming to the hospital from the nursing home. Although Robinson felt that she was being asked to falsify medical records, Winney allowed her to complete the documents as she deemed proper without taking any adverse action against her.

On July 25, 1995, Patient C was admitted as an acute care patient in the hospital. On July 27, 1995, Patient C was transferred by his attending physician to swing bed status. Part of Winney's duties included non-medical utilization review for compliance with Medicare classifications and qualifications. In order to qualify for swing bed Medicare classification, a patient had to have three prior nights of acute care. Winney recognized that Patient C did not qualify for swing bed classification because he had not spent the requisite three prior nights in acute care. Petitioners Robinson and Frahm contend that the director suggested that Patient C's records be changed to

---

[1] "Swing" bed is a Medicare designation permitting less physician involvement in the patient's care than an "acute" bed and more than nursing home care. Certain requirements must be met in order to obtain qualification for Medicare reimbursement of "swing" bed care. "Swing" bed care is provided in the hospital rather than the nursing home.

qualify him for Medicare. Robinson testified at trial as follows:

> Q. And then your testimony is she said, "All we have to do is change these dates," correct?
>
> A. Correct.
>
> Q. And Chin Frahm immediately said, "I'm not changing anything," or words to that effect, right?
>
> A. That's correct.
>
> Q. And Ms. Winney immediately replied, "No, no, no. I'm not asking you to change anything"; isn't that true?
>
> A. That wasn't my interpretation of what she said.
>
> Q. Well, I'm not talking about interpreting what she said. I'm talking about the words she spoke. She said, "No, no, no. I'm not asking you to change anything," didn't she?
>
> A. She said, "No, no, no. I'm not asking you to change anything."

Aplt. App. Vol. II at 452. In the end, Patient C's records remained unaltered, he failed to qualify for Medicare, and no adverse personnel action was taken against any of the Petitioners relating to the incident. Petitioners' allegations of a plan to commit Medicare fraud is without support in the record.

Assertions that the Petitioners were fearful for their licenses and might potentially have faced criminal charges are also subjective interpretations of the facts, and are not supported by the record. There is no evidence

which indicates that any action which jeopardized Petitioners' licenses or threatened them with criminal prosecution was ever taken.

Petitioners also allege that Winney lied to state inspectors concerning staffing. Petitioners take liberties with the record on this point. They submitted their resignations on August 9, 1995. The next day, although finding no wrongdoing by Winney, the Hospital administrator discharged her in order to appease the Petitioners, who had actually controlled the nursing service at this small hospital for some time. After meeting with Winney and the administrator and learning that no wrongdoing had been found, the Hospital Board directed the administrator to reinstate Winney. On Friday, August 11, 1995, Winney was told that she was reinstated in her position and to return to work on Monday, August 14, 1995.

That same Monday a state survey team came to inspect the facility. They identified staffing problems which had occurred over the weekend between Winney's reinstatement and return to work, a period that she was not working. Winney believed that a nursing assistant was scheduled to work over that weekend and so advised the state inspection team. She was mistaken and later acknowledged such. A mistaken belief about scheduling during the time when Winney had just been discharged and then reinstated is far from an overt lie to the state survey team as claimed by Petitioners.

More importantly, this incident occurred after the Petitioners submitted their resignations. Petitioners cannot bootstrap a claim for constructive discharge on events occurring after their resignations.

Petitioners assert that "[b]oth of the Respondent's expert witnesses and a hospital board member admitted on the stand that if the facts as alleged by Petitioners were true, the Petitioners had no choice but to resign." Petition p. 7. These witnesses were not called by the Hospital to establish whether the Petitioners should have resigned or not. Neither of the two witnesses alleged by the Petitioners to be experts were ever asked by either party to opine as to whether or not Petitioners were forced to resign. Rather they were called by the Hospital to testify factually about certain conversations and consultations they had with Winney. In response to a hypothetical cross-examination question unsupported by the record, one testified that falsifying a date on a chart is illegal and unethical, and that to even suggest changing dates on a chart is a "serious shortfall." The other testified that it would be forbidden to backdate medical records to qualify a patient for Medicare, and that if a person did that, she might wind up in the state women's prison. Nowhere in the record is there any evidence establishing that any medical records were falsified or improperly changed.

During the first month that Winney was employed as the Director of Nursing, the administrator took a three week vacation. Upon his return on Monday, August 8, 1995, three of the Petitioners (Frahm, Robinson, and Crisman) submitted complaints relating to the new director. Yearous did not submit a complaint to the administrator. The administrator spoke individually with the three Petitioners who submitted complaints and informed them that he would look into their complaints. Despite his assurances, the Petitioners submitted their resignations the next day, August 9, 1995.

After Winney's discharge and reinstatement, which occurred during that work week, the Board instructed the administrator to ask the Petitioners to rescind their resignations, remain at the Hospital and try to resolve their differences with Winney. The administrator then made persistent pleas to the Petitioners to reconsider their resignations, which they ignored.

The Petitioners requested an informal hearing before less than the entire Board after they submitted their resignations. The Board offered them a formal hearing before the entire Board at its next regularly scheduled meeting. The Petitioners did not accept the offer and no hearing was therefore conducted.

A more detailed statement of facts is set forth in the Tenth Circuit's opinion. (Petition Appendix A, pp. A-3 through A-10).

III. THE TENTH CIRCUIT CORRECTLY DETERMINED THE FACTS IN THE LIGHT MOST FAVORABLE TO PETITIONERS AND APPLIED THE CORRECT RULE OF LAW.

Petitioners argue that the Tenth Circuit incorrectly applied a subjective standard of review when reviewing the jury verdict in this matter. They assert that the Tenth Circuit erroneously determined the facts of record when it held there was insufficient evidence to support the verdict.

The record shows that the Tenth Circuit set forth and applied the correct standard of review in its opinion. It stated that "[t]he standards governing our review are

well established. We will reverse the denial of a Rule 50 motion only if the evidence points but one way and is susceptible to no reasonable inferences supporting the nonmoving party. *Haines v. Fisher,* 82 F.3d 1503, 1510 (10th Cir. 1996). 'We do not weigh the evidence, pass on the credibility of witnesses, or substitute our conclusions for that of the jury. However, we must enter judgment as a matter of law in favor of the moving party if there is no legally sufficient evidentiary basis with respect to a claim . . . under the controlling law.' *Mason v. Oklahoma Turnpike Authority,* 115 F.3d 1442, 1450 (10th Cir. 1997) (internal quotations and ellipses omitted)." (Tenth Circuit's opinion; Petition Appendix A, p. A-3).

The Tenth Circuit properly recognized that an employee's constructive discharge from a position in which an employee has a protected property interest may be actionable under 42 U.S.C. § 1983 citing *Bailey v. Kirk,* 777 F.2d 567, 579 (10th Cir. 1985). (Petition Appendix A, p. A-10). The central focus of the Tenth Circuit's analysis was on the voluntariness of Petitioners' resignations. The Court considered the totality of the circumstances under an objective standard, a correct application of the law under *Parker v. Board of Regents of Tulsa Jr. College,* 981 F.2d 1159, 1161-62 (10th Cir. 1992); *Hargray v. City of Hallandale,* 57 F.3d 1560, 1570 (11th Cir. 1995); *Maez v. Mountain States Telephone and Telegraph, Inc.,* 54 F.3d 1488, 1502 (10th Cir. 1995); *Lenz v. Dewey,* 64 F.3d 547, 552 (10th Cir. 1995); *Cacy v. City of Chickasha,* 124 F.3d 216 (10th Cir. 1997) (unpublished).

Petitioners have a misconception of the actual record and make factual assertions inconsistent with it. A review of the record demonstrates beyond any doubt that the

Tenth Circuit properly reviewed the record and considered the facts to be found there in the light most favorable to the Petitioners.

The Tenth Circuit then applied the correct rule of law in determining whether that evidence could support a constructive discharge claim, or showed that Petitioners voluntarily resigned. The resources of the United States Supreme Court should not be expended on a dispute over whether the record shows the facts to be as the disgruntled Petitioners claim or as the Tenth Circuit held when applying the appropriate standard of review. Supreme Court Rule 10.

IV. THE TENTH CIRCUIT WAS CORRECT IN REVERSING RATHER THAN REMANDING FOR A NEW TRIAL WHEN THERE WAS A LEGALLY INSUFFICIENT EVIDENTIARY BASIS FOR A CLAIM OF CONSTRUCTIVE DISCHARGE.

The Petitioners argue that because the jury was not instructed on the factors relating to voluntariness of the resignation as set forth in *Lenz, supra* and *Parker, supra,* the case should have been remanded for a new trial rather than reversed. They miss the point of the Tenth Circuit's ruling – the undisputed facts demonstrate that as a matter of law their resignations were voluntary, and that as a matter of law they were not constructively discharged. There was never a case to submit to a jury, and remand for trial on evidence which was insufficient as a matter of law to submit to a jury would have been senseless, futile, and contradictory.

Moreover, Petitioners misstate the record relating to the instruction conference, for whatever importance it has. Instruction No. 18, relating to the issue of voluntary resignation, was not tendered by either party, but was developed by the trial court. Aplt. App. 1390. It originally contained the list of four factors set forth in *Lenz, supra.* and *Parker, supra.* Respondent had no objection to the instruction as originally proposed by the Court. Aplt. App. 1384. However, Petitioners objected arguing that the factors didn't apply to this kind of case. Aplt. App. 1387. The trial court decided to give the instruction as requested by Plaintiffs, deleting the four factors.

Counsel for Respondent stated at the appropriate time that the instruction properly reflected the law and it should have been given. Without the four factors, the instruction was meaningless. Petitioners refer to an isolated comment by Respondent's counsel that he understood the language to be contentious. This statement was no more than an acknowledgment that there was disagreement between the parties. It certainly cannot provide a basis for argument that Respondent did not believe the jury should be instructed to consider the *Lenz* factors or that the instruction was not a correct statement of the law. Respondents clearly argued that the factors were a correct statement of the law and objected to the trial court's refusal to give that instruction.

More importantly, the fact that the jury might have been improperly instructed in a manner which prejudiced Respondent and benefitted Petitioners did not preclude the Tenth Circuit from reversing rather than remanding when its review of the record in light most favorable to the Petitioners reveals no legally sufficient evidentiary

basis for a claim under controlling law – there was nothing for a jury to determine. *Mason v. Oklahoma Turnpike Authority,* 115 F.3d 1442, 1450 (10th Cir. 1997). There was no point in remanding the case for a new trial on legally insufficient evidence no matter what the correct instruction might have been if there was not a case to submit to a jury.

V. PETITIONERS ARGUE A CONFLICT BETWEEN THE CIRCUITS WHICH MAY OR MAY NOT EXIST. IN EITHER CASE, THE TENTH CIRCUIT APPLIED THE STANDARD LESS ONEROUS TO PETITIONERS AND STILL FOUND INSUFFICIENT EVIDENCE TO SUPPORT THEIR CLAIMS. REVIEW COULD NOT YIELD PETITIONERS ANY RELIEF.

Petitioners argue "that the contours of the constructive discharge doctrine is an important question of federal law", and that there is a dispute between the decisions of the Fifth Circuit (including *Fowler v. Carrollton Public Library,* 799 F.2d 976, 979 (5th Cir. 1986)) and those of the Tenth Circuit (including *Spulak v. Kmart Corp.,* 894 F.2d 1150, 1154 (10th Cir. 1990)).

In the appeal to the Tenth Circuit, the parties disagreed as to whether the constructive discharge standard applied in Title VII sexual harassment cases should be utilized in 42 U.S.C. § 1983 due process claims. There are distinctions between the Fifth Circuit's analysis of constructive discharge under 42 U.S.C. § 1983 on the one hand, and the Tenth Circuit's analysis of constructive discharge under Title VII and the ADEA on the other. Respondent argued at length that the Tenth Circuit

should follow the Fifth Circuit when a constructive discharge is claimed to be a deprivation of property without due process of law under 42 U.S.C. § 1983.

Under the Fifth Circuit's approach, there must be a nexus between the conduct complained of and the constitutional right asserted. Constructive discharge in a procedural due process case constitutes a § 1983 claim only if it amounts to a forced discharge to avoid affording an employee the pretermination due process procedures described in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). *Fowler v. Carrollton Public Library*, 799 F.2d 976, 980-981 (5th Cir. 1986). Under this standard, there must be evidence of a purposeful effort to cause an employee to resign to avoid providing him his procedural due process rights.

As to a claim for constructive discharge based on Title VII and the ADEA, the Tenth Circuit has held that such a claim arises when an employer deliberately makes or permits an employee's working conditions to become so intolerable that a reasonable person would have no choice but to resign, and the employee does in fact resign. *Spulak v. Kmart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990). An employer is only responsible for intending those consequences that can reasonably be foreseen as the result of its actions. *Id.* at 1154. Hence, an objective standard is applied in the Tenth Circuit in constructive discharge claims based on Title VII and ADEA. That standard works well in a sexual harassment case – an employer who tolerates sexual harassment in the workplace should reasonably expect the harassed employee to quit, even if he has no intent to force the employee to do so.

Respondent believes that comparing the elements of constructive discharge for those two different types of claims is like comparing apples to oranges – the standard is probably different because of the nature of the claims, not because of a conflict between the Circuits. Whatever the merits of that argument, Tenth Circuit did not address these distinctions and simply applied the reasonable person objective standard it uses in Title VII and ADEA claims, the standard argued for by Petitioners. Petitioners are not in a position to raise the distinctions argued below as basis for granting review when the standard which they argued for was in fact applied by the Tenth Circuit.

The Tenth Circuit agreed with Petitioners as to the law of constructive discharge – it just found that as a matter of law they had failed to produce evidence sufficient to prove the elements for which they argued. This was the less onerous of the two standards. If this Court reviewed the case, it could hold that the Tenth Circuit applied the correct standard, or that it should have applied the more stringent test of the Fifth Circuit. If Plaintiffs could not meet the lesser standard, they certainly couldn't meet the greater. Therefore, no meaningful relief could come to them from review.

VI. FOR THE FIRST TIME, PETITIONERS ARGUE A DISTINCTION BETWEEN THE ELEMENTS OF CONSTRUCTIVE DISCHARGE UNDER FEDERAL LAW AND STATE CONTRACT LAW. THIS ARGUMENT IS UNTIMELY AND WAS WAIVED.

Petitioners argue that the Tenth Circuit improperly applied Federal principles of constructive discharge to Petitioners' State law claim for breach of contract. This argument is contrary to the positions taken by the Petitioners below. Petitioners argued to the Tenth Circuit:

> The district court also properly instructed the nurses' contract claim (Instruction 23, Aplt. App., Vol. 1, N.28, p. 268), setting forth the elements of the contract claims as well as the elements of constructive discharge in a contract setting. This instruction, which was not objected to by Hospital, did not contain a requirement of any intent on the part of the employer. Rather, it merely stated that, with respect to the constructive discharge, appellees had to prove: "That a reasonable person would have viewed the working conditions at the hospital as so intolerable that the employee plaintiff would have no other choice but to quit."

(Petitioners' Response Brief to Tenth Circuit Court of Appeals, pp. 21-22). The jury was instructed that in order for the Petitioners to recover on *any* of their claims, they each must prove they were constructively discharged. Instruction 15, Aplt. App. 261. They were thus told that the definition of constructive discharge was the same for the State and Federal claims. It is much too late to raise this issue now by a petition for certiorari. *Ellis v. Dixon*, 349 U.S. 458, 75 S.Ct. 850, 852 (1955).

Petitioners got the instructions they wanted in the trial court. Instruction 23 defined the elements of breach of contract by constructive discharge as including a requirement that "a reasonable person would have viewed the working conditions at the hospital as so intolerable that the employee plaintiff would have no other choice but to quit". Aplt. App. 268. This is precisely the standard that the Tenth Circuit applied in its opinion. Petitioners did not object to either of these instructions at trial, nor did they raise any issue concerning them on appeal – indeed, they argued that this was a correct instruction over Respondent's argument that they had to prove an intent to cause them to resign. The issue cannot be raised now.

Petitioners also argue that "the Hospital had a clear and unambiguous policy which required the administrator to set up a hearing with the board of directors if an employee wished to address the board." (Petition pp. 9-10). They contend that there was evidence at trial indicating that the nurses had asked for a hearing with the board on several occasions. Therefore, they argue, there was evidence of a breach of contract because Petitioners did not receive a hearing.

Petitioners misstate the record on this point. The Petitioners were offered a formal hearing before the entire Board. Petitioners wanted an informal hearing instead and declined to participate in the formal hearing offered. The Board was not obligated to tailor the hearing to the whims of the Petitioners.

More importantly, the jury was never asked to decide whether Petitioners' implied contracts of employment

were breached in some way other than by constructive discharge. Petitioners offered no instructions in this regard and did not object to those instructions given which directed the jury to consider only the constructive discharge claim as a possible breach of contract. The verdict form, to which Petitioners likewise did not object, asked the jury to decide only whether their implied contracts had been breached by constructive discharge. Once again, Petitioners cannot raise this issue for the first time on a petition for certiorari. *Ellis v. Dixon, supra.*

VII. CONCLUSION

Petitioners base their request for review on an erroneous view of the facts of record. They also claim a purported and perhaps nonexistent conflict between the circuits which was not even material to the Tenth Circuit's resolution of the case. Finally, they argue a putative distinction between State and Federal standards defining constructive discharge, making an argument contrary to the position they took below. Petitioners identify no issue worthy of this Court's exercise of its discretionary jurisdiction, and the petition should be denied.

Dated this 12th day of March, 1998.

Respectfully submitted,

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